Money

Suit

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SUPREME COURT OF THE UNITED STATES.

No. 181. 85

THEODORE SHILLABER, APPELLANT,

vs.

JOHN ROBINSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED OCTOBER 17, 1874.

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1 [SEAL.] The President of the United States of America to John Robinson, greeting:

You are hereby commanded that you and each of you personally appear before the judges of the circuit court of the United States of America for the eastern district of New York, in the second circuit, in equity, on the first Monday in January, A. D. 1871, wheresoever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Theodore Shillaber, and to do further and receive what the said court shall consider in that behalf; and this you are not to omit under the penalty on you of two hundred and fifty dollars.

Witness, Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, at the city of Brooklyn, on the 18th day of November, in the year one thousand eight hundred and seventy, and of the Independence of the United States of America the ninety-fifth.

CHAS. W. NEWTON, *Clerk.*

COLES MORRIS,
Complainant's Solicitor.

The defendants are required to enter appearance in the above cause, in the clerk's office of this court, on or before the first Monday of January, 1871, or the bill will be taken "pro confesso" against them.

CHAS. W. NEWTON, *Clerk.*

COLES MORRIS,
Complainant's Solicitor.

2 A copy of the within writ served personally on John Robinson on the 28th day of November, 1870, at the town of Flatbush, county of Kings.

FRANCIS L. DALLON,
U. S. Marshal.

(Indorsed:) U. S. circuit court, eastern district of New York. Theodore Shillaber vs. John Robinson. Subpœna ad respondendum. Filed January 3rd, 1871.

3 Circuit court of the United States, eastern district of New York.

To the judges of the circuit court of the United States for the eastern district of New York:

Theodore Shillaber, of San Francisco, California, and a citizen of the said State of California, brings this his bill against John Robinson, of Brooklyn, New York, and a citizen of said State of New York, and thereupon your orator complains and says, upon information and belief, that heretofore, and on or about the twelfth day of October, in the year of our Lord eighteen hundred and fifty-two, John Shillaber, the father of your orator, made and entered into, with the said John Robinson, an agreement in writing, bearing date on that day, wherein and whereby it was agreed between the said John Shillaber and the said John Robinson, among other things, as follows:

Firstly. The said John Shillaber agreed among other things to sell to the said John Robinson, who agreed to purchase the same, the
4 following real estate and other property, that is to say, about three thousand acres of land, situate in Lee and Ogle Counties, in the State of Illinois, about one thousand and five hundred acres of

which is called La Grange farm, and the remainder of which had been designated by the said John Shillaber by the name of Buena Vista; also about one thousand acres of land called the Bluff, situate in Lee County, in the said State of Illinois, and bounded on the north by the Rock River; the said lands to be conveyed by the said John Shillaber to the said Robinson, with all the buildings and improvements thereon as they were there situated; also all the farm stock, cattle, horses, sheep, swine, farming utensils, machines, and tools and stock and material of all kinds then on the said lands.

Secondly. The price of all the said lands, with their improvements, was six dollars and seventy-five cents per acre, amounting in all to the sum of twenty-seven thousand dollars. The price of the other property above specified was to be its fair value, to be agreed upon by the parties, or if they could not agree, by disinterested appraisers, one to be chosen by each party and a third by the other two, whose award and ap-
5 praisement, made on due notice to both parties, should be conclusive.

Thirdly. The said John Robinson was to pay for the said land and other property at the times and in the manner following:

He was to pay eight thousand dollars in lawful money of the United States upon the execution and delivery of the deed of the real estate above described, and the transfer and delivery of possession thereof, and of the above-mentioned personal property, to him. He was to pay three thousand dollars, part of said purchase-money, by the sale and conveyance to the said John Shillabar of three sections or lots of land situated upon Clarkson street, in the village of Flatbush, in Kings County, in said State of New York, and then owned by the said John Robinson. He was to pay the sum of four thousand dollars, part of said purchase-money, by the conveyance and sale of about four hundred and twenty acres of land situate in the town of Fallsburgh, in Sullivan County, in said State of New York, near Lansburgh Post-Office, then owned by the said Robinson, and about seventy-four acres of
6 land situated in the town of Minerva, Essex County, in the said State of New York, then owned by the said Robinson, and he was to secure the payment of the balance of such purchase-money, payable at the end of five years with six per cent. interest, payable semi-annually, by his personal bond, and a second mortgage upon the farm and premises in the town of Flatbush, Kings County, in said State of New York, where the said Robinson then resided, and which contained twenty-six acres, more or less.

Fourth. The deeds of conveyance of the property so purchased by the said Robinson, and also of the lands to be conveyed in payment therefor as above stated, were to be executed as soon as might be, with all reasonable dispatch. And all such deeds were to be properly executed and to be good and sufficient to convey a good and undefeasible title in fee-simple to the respective parties, and be executed by all necessary parties, and contain all the usual covenants in use in the said State of New York.

Fifthly. All the lands to be conveyed by either party to the other were to be free and discharged from all liens and incumbrances,
7 and charges of every kind, and from all taxes and assessments of every description, as by the said agreement, reference being thereunto had, will more fully appear.

And your orator further shows, upon information and belief, that afterwards a suit was commenced in the court of chancery of the said State of Illinois, in the county of Ogle, in said State, by the said Robin-

, against the said John Shillabar, to enforce a specific performance of e above-mentioned contract, during the pendency of which said suit, l before any hearing in the same was had, the said John Shillabar parted this life intestate, leaving him surviving your orator, his son l only heir at law, and letters of administration of his estate were reupon, in due form of law, granted to one Silas Noble, by the county art of said Ogle County. And a supplemental bill was thereupon d in said suit by the said Robinson against your orator, the said as Noble, and other parties, and such proceedings were thereupon had said suit that at the October term of the Ogle County circuit court of d State of Illinois an interlocutory decree was made in said suit, wherein and whereby it was ordered, adjudged, and decreed, among other things, that said contract be enforced, carried into effect, and specifically performed, according to the true intent and meaning thereof, and that the said cause be referred to Joseph Lewis, esqr., s a special master of said court, to take further testimony therein, as y said interlocutory decree, reference being thereto had, will more fully ppear.

And afterwards, at a circuit court, sitting as a court of chancery, at the court-house in the city of Rock Island, within and for the county of Rock Island, in said State of Illinois, on the tenth day of September, A. D. 1860, before the honorable J. H. Howe, judge of the sixth judicial circuit of said State of Illinois, a final decree was made in said suit, wherein and whereby it was adjudged, among other things, as follows: That the said John Shillabar died seized of all the lands and premises described in the above-mentioned contract as La Grange, and amounting to fourteen hundred and fifty $\frac{64}{100}$ acres, and also of all the lands therein described as situated in the county of Ogle and State of Illinois, and embraced in what was known as Buenavista, and containing two hundred and eighty acres; that the said lands known as La Grange were subject to a mortgage in favor of Thomas Colledge, who had been made a party to said suit; and the said lands situate in Ogle County, and being part of the lands known as Buena Vista, were subject to a voluntary conveyance by the said John Shillabar to Joseph B. Brooks, who had also been made a party to said suit, and that a good title could be made thereto. That the lands in said contract described and known as the Bluff, and also those therein described as being part of Buena Vista, and situate in the county of Lee, were subject to incumbrances at the time of the making of said contract, under and by virtue of which incumbrances the said lands had subsequently been sold and the title thereto had passed beyond redemption. That the lands in said contract described to which a good title could be made amounted to seventeen hundred and thirty-two $\frac{64}{100}$ acres, which, at the contract-price of six dollars and seventy-five cents per acre therefor, amounted to the sum of eleven thousand six hundred and ninety-five dollars and thirty-two cents, ($\$11,695\frac{32}{100}$,) from which amount the sum of three thousand dollars being deducted for the price of the three lots of the said Robinson in Clarkson street, in the village of Flatbush, Kings County, State of New York, and the further sum of four thousand dollars for the price of said Robinson's land in Sullivan and Essex Counties, in said State of New York, left a balance of four thousand six hundred and ninety-five dollars and thirty-two cents ($\$4,695\frac{32}{100}$) to be paid by the said Robinson on the La Grange and Buena Vista lands aforesaid, situate in said Ogle County, and that the interest on said sum to the date of said decree amounted to the sum of twenty-two hundred and thirty-six dollars and fifty-three

cents, making a total balance due by the said Robinson on said purchase of six thousand nine hundred and thirty-one dollars and eighty-five cents, ($6,931 $\frac{85}{100}$.)

That the amount of the principal of said mortgage so held by the said Thomas R. Colledge was three thousand dollars, and the amount of indebtedness thereon by the said John Shillabar to the said Colledge, for principal, interest, and taxes, up to the date of said decree, was the sum of six thousand and fifty dollars and twenty-five cents, ($6,050 $\frac{25}{100}$,) which sum should be allowed to the said Robinson as part payment of the said consideration-money of eleven thousand six hundred and
11 ninety-five dollars and thirty-two cents.

That the said John Shillabar, during his life-time and up to the time of his death, received the rents and profits of the said lands known as La Grange, and that your orator received the rents and profits thereof from the time of the decease of the said John Shillabar up to the 1st day of April, A. D. 1855.

That the said Colledge took possession of said lands included in his said mortgage on the said first day of April, 1855, and received the rents and profits thereof until the spring of the year 1859, and that the actual rental value thereof, which was or should have been received by said Colledge and for which he should account, amounted to the sum of three thousand dollars, which sum forms a part of the said sum of six thousand and fifty dollars and twenty-five cents, which, as is above stated, was allowed by said decree to the said Robinson as part payment of the said consideration-money of eleven thousand six hundred and ninety-five dollars and thirty-two cents.

That the said Robinson suffered damage in preparing to execute the said contract on his part and to take possession of said land. That, since the death of said John Shillabar, there had been removed
12 from or destroyed on said premises known as La Grange, over and above ordinary wear and tear, loss, and depreciation, fences, sheds, and other improvements, and that there had been timber cut down, taken off, and removed, and not applied for the use of said farm, and all of which said profits and damages in equity should be accounted for and allowed to the said Robinson. That the said Robinson had paid for taxes and the redemption of said lands from tax-sales certain sums of money in said decree mentioned, which should also be accounted for and allowed to him. And that the said Robinson was entitled to be credited and allowed for said rents and profits, and for such damage and for such sums of money paid by him for taxes and the redemption of said lands from tax-sales, the sum in the aggregate of five thousand one hundred and thirty-one dollars and eighteen cents, ($5,131.18,) making with the said amount of mortgage indebtedness to said Colledge the entire amount to be credited and allowed to said Robinson, and which he should in equity be allowed upon his said contract, the sum of
13 eleven thousand one hundred and eighty-one dollars and forty-three cents, ($11,181.43.) And leaving the sum of four thousand two hundred and forty dollars and fifty-eight cents in excess and over and above the amount due by the said Robinson at the date of said decree upon and by the terms of the said contract. And the said court did, in and by the said decree, further find that the said Robinson ought not, in equity and good conscience, to be required to convey to your orator said lots in Flatbush and said lands in Sullivan and Essex Counties, in the said State of New York, without some security or lien upon the same for the repayment to him of the aforesaid surplus and balance of four thousand two hundred and forty-nine dollars and fifty-eight cents,

($4,249.58,) and that the same ought to be paid to him within a reasonable time, or that he be permitted to enforce the payment of the same from and out of the said lots in Flatbush and lands in Sullivan and Essex Counties, in said State of New York, and have the same sold for that purpose. And it was thereupon then and there further adjudged and decreed by the said court, among other things, that the said Robinson should make, execute, and deposit with the clerk of said court a good and
14 sufficient conveyance in the law to said three sections or lots of land situate in Clarkson street, in the town of Flatbush, Kings County, New York, and also to said tract of four hundred and twenty acres of land situated in the town of Fallsburgh, in Sullivan County, New York, and also to said tract of seventy-four acres of land situate in the town of Minerva, Essex County, New York, which deed should be for the expressed consideration of three thousand dollars, for said lots in Flatbush, and for the expressed consideration of four thousand dollars for said lands in Sullivan and Essex Counties, and should contain full covenants of warranty of title, and that the same were free from all incumbrances, and should be duly acknowledged according to the laws of the State of New York, and should be deposited with said clerk as an escrow within ninety days from the date of said decree, and should run to your orator, heir at law of John Shillabar, deceased.

And it was further ordered and decreed that your orator and the said Silas Noble, or one of them, should pay, or cause to be paid, within the said term of ninety days from the date of said decree, to said Robinson or to the clerk of said court, the said sum of four thousand two hun-
15 dred and forty-nine dollars and fifty-eight cents, and interest thereon from the date of said decree.

And that if the said Robinson should, within the time aforesaid, deposit as above directed his said deed to your orator, and your orator and the said Silas Noble should fail or neglect to pay to said Robinson, or to said clerk, within the said time of ninety days, the said sum of four thousand two hundred and forty-nine dollars and fifty-eight cents and interest, then the said clerk should deliver up to said Robinson said deed made by him to your orator to said Flatbush lots and to said lands in Sullivan and Essex Counties, New York, and the said Robinson thereupon and at the same time should execute and deliver to said Silas Noble a trust-deed to said lots and lands in New York, in terms that the said Silas Noble should proceed to sell the same in such manner and after giving such reasonable notice of the time and place of said sale as might be usual or provided by law in the said State of New York, and should make, execute, and deliver to the purchaser or purchasers thereof good and sufficient legal titles for the same, and
16 out of the proceeds of such sale should pay first the expenses of such trust, and afterwards the said sum of money so due to the said Robinson, and interest, and should hold the balance subject to the further orders of said court.

And if the said Silas Noble or your orator should pay to the said Robinson or to the said clerk the said sum of four thousand two hundred and forty-nine dollars and fifty-eight cents and interest within the said ninety days, then said deed made by said Robinson to said property in New York should be delivered to your orator, or to his authorized agent, and should vest in him a good and perfect title to said property therein described.

That your orator should also, within the said ninety days, on the said Robinson's complying with the terms of said decree, execute and deliver to said Robinson a release of all your orator's rights and equity of re-

demption in and to said property and premises in the State of Illinois,
and called La Grange, and in and to the portion of said lands
17 called Buena Vista, lying in Ogle County, in said State of Illinois,
and that on your orator's failure to do so said decree should be taken as a lien on all your orator's rights, title, and interest in said premises and lands, or any part thereof, as heir at law of said John Shillabar, and your orator was by the said decree, upon the compliance with the provisions thereof on the part of said Robinson, to be barred and foreclosed of all right, title, and equity of redemption in the said premises and lands. And that said decree also provided for the execution and delivery by or on behalf of other parties to said suit to said Robinson of such conveyances and releases as by the said court were adjudged necessary and proper in order to assure to the said Robinson a good and absolute title in fee-simple to the said premises and lands in Illinois, free and clear of all incumbrances, as by the said decree, reference being thereunto had, will more fully appear.

And your orator further alleges, on information and belief, that the said decree at the commencement of this suit was, and is now, in full
force and effect. And your orator further alleges and charges
18 that there is an obvious error in the account stated in said decree
between your orator and the said Robinson, in this, that although the said Robinson is credited in said account with the entire rents and profits from the date of said contract to the date of said decree of said lands in said State of Illinois which by said decree are adjudged to be conveyed by your orator to him, he is only charged in said account with interest during the same period on a portion of the sum of eleven thousand six hundred and ninety-five dollars and thirty-two cents which is the amount of consideration-money found by said decree to be due by him to your orator for said lands, that is to say, upon the sum of four thousand six hundred and ninety-two dollars and thirty-two cents. That upon the theory on which the said decree is framed, and by the clear intent and purview of its provisions, the said Robinson should have been charged in said account with the interest on the whole of said consideration-money from the date of said contract to the date of said decree.

19 That the interest on the portion of said consideration-money which is not so charged to said Robinson, to wit, on the sum of seven thousand dollars from the date of said contract to the date of said decree, amounts to the sum of three thousand eight hundred and seventy-nine dollars and thirteen cents, which sum, if it had been charged to the said Robinson in the said account between him and your orator, would have reduced the balance of said account against your orator from the said sum of four thousand two hundred and forty dollars and fifty-eight cents, as incorrectly stated in said decree, to the sum of three hundred and sixty-one dollars and forty-five cents.

And your orator further alleges that at the times of the making and settling of said final decree your orator was absent from the said State of Illinois, and was not represented by attorney or counsel.

That your orator's pecuniary affairs were then and for many years afterwards very much embarrassed, and he was not able to pay for the services of legal counsel in said matter, and that it is only within a few
days before the commencement of this action that he discovered
20 the said error in said account, but that said error is so glaring and
produced resu'ts so improbable that it could not have deceived or misled the said Robinson or his atttorney in said suit. And your orator charges, upon information and belief, that neither the said Rob

inson nor his said attorney was so deceived or misled, but that on the contrary the said Robinson or his said attorney, intending to defraud your orator of the said sum of three thousand eight hundred and seventy-nine dollars and thirteen cents, purposely caused the said decree to be so ingeniously worded as to appear, on a superficial examination thereof, to fully carry out the decision of said court on such final hearing of said suit, and to charge the said Robinson with all the interest which under said decision was due by him to your orator.

And your orator further alleges, upon information and belief, that the said Robinson, in pursuance of said decree, duly executed and deposited with the clerk of said court, within ninety days from the date of said decree, a good and sufficient conveyance, duly acknowledged according to the laws of the State of New York, and running to your orator
21 as heir at law of said John Shillabar, deceased, to said three sections or lots of land situate on Clarkson street, in the town of Flatbush, Kings County, New York, and also to said tract of four hundred and twenty acres of land situate in the town of Fallsburgh, in Sullivan County, New York, and also to said tract of seventy-four acres of land situate in the town of Minerva, in Essex County, New York; and that the said Robinson thereupon entered into possession of the said premises and land in Illinois, and received from such parties to said suit as were directed by said decree to execute the same all such conveyances and releases as by the said decree were adjudged necessary or proper to assure to the said Robinson an absolute title in fee-simple to said premises and lands, free and clear of all incumbrances; that no money was paid or caused to be paid by your orator or the said Silas Noble to the said Robinson or to the clerk of said court, and that at the expiration of ninety days from the date of said decree, as your orator is informed and believes, the said clerk, in pursuance of said decree, delivered to said Robinson the said deed theretofore made by him to your orator, and deposited by him with said clerk as aforesaid, and the same was cancelled and annulled by the said Robinson.

22 And your orator further alleges, upon information and belief, that the said Robinson pretends that he thereupon made and delivered to said Silas Noble a deed to said Flatbush lots, and to said lands in Sullivan and Essex Counties, in the State of New York, which deed was a trust-deed in the form and with the powers and directions provided for by said decree.

And your orator is advised by counsel, and believes, that if any such deed as is provided for by said decree was so executed and delivered by the said Robinson to the said Silas Noble, it would be construed by the laws of the State of New York to be, and was, simply a mortgage of the said Flatbush lots and of the said lands in Sullivan and Essex Counties, New York, to secure the payment to said Robinson of whatever sum of money was due to him by your orator at the date of said decree, and interest thereon.

And that the equity of redemption of your orator in said lots and lands could not have been foreclosed, except by the decree of a
23 court of competent jurisdiction in the State of New York, or by a sale or sales of said lots and lands under and in pursuance of part 3rd, chapter 8th, and title 15th of the revised statutes of said State in relation to the foreclosure of mortgages by advertisement.

And your orator further alleges, upon information and belief, that no such deed has ever been recorded in either of the counties of Kings, Sullivan, or Essex, in the State of New York, and that no actual or constructive notice of any suit, or proceeding, or sale to foreclose your ora-

tor's equity of redemption in said lots or lands, or any part thereof, has ever been served on your orator, or given, or published by said Noble, or any other person in any manner.

And your orator further alleges, on information and belief, that since the time of the pretended execution and delivery of said trust-deed by the said Robinson to the said Silas Noble, the said Robinson has sold and conveyed to divers persons, neither of whom had any knowledge or notice of the said contract, or of the said decree, or of the execution of any such trust-deed, by said Robinson, to the said Silas Noble, the whole of said lots in Flatbush, Kings County, and of the said lands in Sullivan and Essex Counties, in the State of New York, and
24 has received from said parties, in consideration of such sales, large sums of money, which he has wholly appropriated to his own use.

That the said Robinson pretends to have become the purchaser of said lots and lands at a sale and sales thereof, made by the said Noble under and by virtue of the said decree, whereas your orator expressly charges the truth to be that if any sale of said lots, or of said lands, or of any part thereof, ever was made by the said Noble to the said Robinson, it was not made in conformity with the provisions of said decree, but in evasion thereof, and in violation of the trust imposed upon the said Noble, thereby, and by a fraudulent connivance between the said Noble and the said Robinson, to defeat the provisions of said decree in favor of your orator, and was not made in such manner, or after giving such reasonable notice of the time and place thereof, as is usual and provided by law in the State of New York, in cases of sales under mortgages of real estate, as is prescribed by said decree.

And your orator further alleges that since the date of said final decree there has been a very great rise in the value of real estate
25 in the said county of Kings, New York, and a considerable rise in the value of real estate in the said counties of Sullivan and Essex, New York; and your orator is informed and believes that at the time of the sale by said Robinson of the said three lots or sections of land in Flatbush, Kings County, and of the said lands in Sullivan and Essex Counties, to divers persons, as is above alleged, the said Flatbush lots were worth at least fifteen thousand dollars, and the said lands in Sullivan and Essex Counties, New York, were worth at least six thousand dollars, making in all the sum of, at least, twenty-one thousand dollars, for which the said Robinson should account to your orator.

And your orator further alleges that the said Robinson has been requested, on behalf of your orator, to render to your orator an account of said sales, but that he has refused and neglected so to do.

And your orator further alleges that the said Silas Noble is a non-resident of this State, and cannot be found therein. To the end, therefore, that the said defendant, John Robinson, may, if he can, show cause why your orator should not have the relief hereby prayed, and may upon his corporal oath, and according to the best and utmost
26 of his knowledge, remembrance, information, and belief, full, true, and direct and perfect answer make to all and singular the matters and charges aforesaid, and more especially to such of the several interrogatories hereinafter numbered and set forth:

1st. Whether, within ninety days from the date of said decree, or at any and what other time, the said Robinson executed and deposited with the clerk of the court by which said decree was made a good and sufficient conveyance, duly acknowledged according to the laws of the State of New York, and running to your orator as heir at law of the said John Shillabar, deceased, to said three sections or lots of lands situate on

Clarkson street, in the town of Flatbush, Kings County, New York, and also to said tract of four hundred and twenty acres of land, situate in the town of Fallsburgh, in Sullivan County, New York, and, also, to said tract of seventy-four acres of land, situate in the town of Minerva, in Essex County, New York.

2nd. Whether at the expiration of ninety days from the date of said decree, or at any and what other time, the said clerk delivered to the said John Robinson said deed, and what afterwards became of
27 the same, and whether the same was or not cancelled or annulled by the said Robinson, and whether the same is now in the possession of said Robinson, and, if not, where is it?

3rd. Whether since the delivery to him by said clerk of said deed the said defendant, John Robinson, has not sold and conveyed to divers, and, if yea, to what particular persons, naming them, the whole or portions, and what portions, of the said three lots or sections of land in Flatbush, Kings County, and the whole or portions, and what portions, of the said lands in Sullivan and Essex Counties, New York, and at what particular times or dates, and for what sum or sums of money, such sales and conveyances were respectively made, and whether the consideration-money of such sales respectively, or what portion thereof in each sale, was received by said defendant in cash, and in what manner the payment of the balance of such consideration-money on each of such sales was secured.

If by mortgage on any real estate or personal property, that the said defendant may produce to this honorable court, whenever there shall be occasion, every such mortgage, together with every bond or note therein mentioned, or if such note, bond, or mortgage is not now in the
28 possession of the said defendant, that he state what has become of it; and if it has been sold or assigned by the said defendant, for what consideration or sum of money, and to whom.

4th. Whether the said defendant ever executed to the said Silas Noble, and, if so, when, any deed to said Flatbush lots or sections of land, and to said lands in Sullivan and Essex Counties, New York, or to any and which portion thereof; and, if yea, of what date and form, and of what purport or effect, and what powers or directions, if any, it contained, and whether it contained any, and what, powers of sale, and any and what directions as to notice to be given by the said Noble of the time or place of such sale, and to what persons, and how to be given or published, and whether such deed has ever been recorded in Kings County, or in Sullivan or Essex County, in the State of New York, or elsewhere, and where; and whether the defendant knows where the said deed now is, or whether he has a draft or copy or duplicate of it in his possession, and, if yea, that he may produce the same to this honorable court whenever there shall be occasion, and whether the said defendant ever
29 delivered such deed to the said Silas Noble.

5th. Whether the said Silas Noble ever made any sale and conveyance to the said John Robinson of the said three lots in Flatbush, Kings County, or of the said lands in Sullivan County, or of the said lands in Essex County, in the State of New York, or of any and what portion thereof; particularly at what time and what place, and for what price, either said Flatbush lots, or said lands in Sullivan County, or said lands in Essex County, or any portion of said lots or lands, were so sold by the said Noble to the said defendant, and whether at private sale or at auction, and which of them, if any, were sold at private sale.

Whether the said defendant ever paid to the said Silas Noble any, and what, portion of the purchase-money of said Flatbush lots, or of said

lands in Sullivan County, or of said lands in Essex County, and whether the balance of any such purchase-money was secured, to be paid by any, and what, mortgage or mortgag's, or other security. In what newspaper, if any, printed in the county of Kings, notice of sale of said
30 three Flatbush lots, or of any portion thereof, was published by the said Noble, and for how many weeks, and for how many times in each week, and what were the form and contents of such notice, and to whom directed.

Whether a copy of such notice was served on your orator, and, if so, in what manner; and whether a copy of such notice was affixed on the outward door of the building where the county courts of said Kings County are directed to be held, and for how long.

Whether the respective notices of sale of the said lands in Sullivan and Essex Counties, New York, were respectively published in any and what newspapers printed in the said counties of Sullivan and Essex, and for how many weeks respectively, and for how many times in each week, and what were the form and contents of such notices respectively, and to whom directed.

And whether copies of such notices were respectively served on your orator, and, if so, in what manner; and whether copies of such notices were respectively affixed on the outward doors of the building in Sullivan and Essex Counties, where the county courts of said counties are directed to be held, and for how long.

31 Whether the sale by the said Noble to the said Robinson either of the said Flatbush lots, or the said lands in Sullivan County, or of the said lands in Essex County, was made under or in pursuance of the decree or judgment of any and what court, and in what county of the State of New York any such decree or judgment was entered, filed, or docketted, or under any other and what proceeding, and where the same was had, and where the papers therein were filed.

And that the said defendant, John Robinson, may set forth a full, true, and just rental, and particular of the said Flatbush lots and lands in Sullivan and Essex Counties, New York; and also a full, true, and particular account of all and every sum and sums of money which he has received for or in respect of the rents and profits of said lots and lands since the tenth day of December, A. D. 1860; and also of all and every sum and sums of money which he has received since the said 10th day of September, 1870, for or from the sale by him of the said lots and lands, and of every portion thereof so sold by him; and that he may set forth a list or schedule and description of every deed, account, or
32 writing relating to the matters aforesaid or any of them, or wherein there is any note, memorandum, or writing relating in any manner thereto, which now are or ever were in his possession or power, and may describe particularly which thereof now are in his possession or power, and may deposit them with the clerk of this court for the usual purposes and otherwise; that the said defendant may account for such as are not in his possession or power; and that the account, as erroneously stated between the said defendant and your orator in said decree of said court of chancery of said State of Illinois as aforesaid, be corrected so as to make it conform to the final decision of said court in said suit, and to the true intent and purview of said decree, and allow to your orator, in said account, the interest on the whole of the purchase-money by said decree found due by the said defendant to your orator, so that the balance of said account against your orator, at the date of said decree, be declared to be the sum of three hundred and sixty-one dollars and forty-five cents, instead of the sum of four

thousand two hundred and fifty dollars and fifty-eight cents, as
33 erroneously stated in said decree; and that the said defendant be charged in account with your orator the highest prices or sums of money which could have been or can be obtained for the said three lots of land in Flatbush, Kings County, and the said lands in Sullivan and Essex Counties, between the tenth day of December, A. D. 1860, and the time of the hearing in this suit, and that the said defendant be adjudged to pay to your orator the balance that may be found due to him by the said defendant upon the said accounting prayed herein, over and above the said sum of three hundred and sixty-one dollars and forty-five cents and interest thereon; and that your orator may have such further relief or may have such other relief as the nature of his case shall require, and as shall be agreeable to equity and good conscience.

May it please your honors to grant unto your orator the writ of subpœna, issuing out of and under the seal of this honorable court, to be directed to the said John Robinson, commanding him by a certain day, and under a certain penalty to be therein inserted, to be and ap-
34 pear before the circuit court of the United States for the eastern district of New York, and then and there to answer the premises, and further to stand to and abide such order and decree therein as shall be agreeable to equity and good conscience.

And your orator shall ever pray, &c.

WM. L. ROY.
COLES MORRIS,
Solr. for Complainant.

COLES MORRIS,
Of Counsel for Complainant.

STATE OF NEW YORK,
Southern District of New York, ss:

On this sixteenth day of November, 1870, before me, personally appeared William L. Roy, and made oath that he has heard read the above bill subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on the information and belief of the complainant, and that, as to those matters, deponent believes it to be true; and deponent further says that the said complainant, Theodore Shillabar, is not a resident of this State, but resides in San Fransciso, in the State of California, and is not at present within this State, and is not ex-
35 pected here; and deponent further says that he was formerly the attorney of the said complainant, under a power of attorney, duly made and delivered to deponent by said complainant, to act for the said complainant in relation to the matters set forth in the aforegoing bill, and the claim of said claimant thefeunder, and that deponent has information as to all the matters stated in said bill.

(Signed) WILLIAM L. ROY.

Sworn to before me this 6th day of Nov., 1870.
EDWARD L. OWEN,
U. S. Commissioner.

36 (Indorsed:) U. S. circuit court, eastern dist. of N. Y. Theodore Shillaber agst. John Robinson. Copy bill. Coles Morris, solr. for comp't. Filed November 18th, 1870.

37 Circuit court of the United States for the eastern district of New York.

THEODORE SHILLABER
agst.
JOHN ROBINSON. } In equity.

I appear in this suit for the defendant John Robinson, and pray the court to enter my appearance accordingly.
January 3rd, 1871.

PHILIP S. CROOKE,
Solicitor for Defendant.

(Endorsed:) U. S. circuit court, E. dist. of New York. Theodore Shillaber vs. John Robinson. Notice of appearance. Filed Jan. 3rd, 1871.

38 Circuit court of the United States, eastern district of New York.

To the judges of the circuit court of the United States for the eastern district of New York:

The answer of John Robinson, defendant, to the bill of complaint of Theodore Shillaber, complainant, states:

This defendant admits that on or about the 12th day of October, A. D. 1852, this defendant and one John Shillaber entered into an agreement for the exchange or sale of certain property therein described, a part of the contents of which said agreement is correctly stated in said bill but not the whole thereof. And this defendant prays leave to refer to said agreement upon the trial of this action for the particulars thereof, and hereby makes the same a part of this his answer. And this defendant states and avers that he has in all things fully, fairly, and equitably carried out and fulfilled said agreement on his part.

And this defendant further admits the commencement of an action by him, this defendant, in the court of chancery of the State of Illinois,
39 in and for the county of Ogle, in said State, for a specific performance of said agreement, and he admits and avers the matters alleged and charged in said bill of the proceedings had in said suit, and the entry and enrollment of a final decree therein on or about the month of September, A. D. 1860, and he alleges and charges that said decree of said court has been, ever since the entry and enrollment thereof, and now, is in full force and effect and unreversed, and is binding upon the parties thereto, the contents of which said decree purport to be stated in said bill, but whether correctly and truly stated therein in all particulars or not, this defendant has not any knowledge or information sufficient to form a belief, and he prays leave to refer to said decree on the trial of this action and makes the same a part of this his answer.

And this defendant states that he has duly, fully, and in all particulars carried out and fulfilled on his part all the requirements and conditions of said decree, but that said Theodore Shillaber did not and has not complied with the requirements of said decree on his part.

And this defendant further states that he did, in compliance
40 with the requirements of said decree, duly execute, together with his wife, a good and sufficient conveyance in the law of the property in Flatbush, Kings County, New York, and of the property in Sullivan and Essex Counties, in said State, to the said Theodore Shillaber,

heir at law of said John Shillaber, and deposited the same with the clerk of said court within the time prescribed in said decree, but that neither the said Theodore Shillaber nor the said Silas Noble paid or caused to be paid to this defendant, or deposited with said clerk within the time prescribed in said decree or at any time, the sum of money therein decreed to be paid or deposited by them.

And defendant states that said Theodore Shillaber and said Silas Noble having failed to pay or deposit said money within the time prescribed by said decree as provided therein, the said clerk did, as provided by said decree and in pursuance of the provisions thereof, deliver back to this defendant the said deed or deeds so made and executed and deposited by him with said clerk. And this defendant did thereupon and at the same time, in pursuance of the provisions of said decree, to-
41 gether with his said wife, make, execute, and deliver to the said Silas Noble a deed in trust of said lands in Flatbush and in Sullivan and Essex Counties, in terms as provided by said decree; that the said Silas Noble should proceed to sell the same in the manner therein provided, and should make, execute, and deliver to the purchaser or purchasers thereof good and sufficient deeds for the same, and out of the proceeds pay first the expenses of such trust, and afterwards the said sum of money so due to said Robinson, this defendant, and interest, and should hold the balance subject to the further order of said court.

And this defendant charges that the said trust deed created a valid trust under the laws of the State of New York, and that under the same the fee to said lands passed to the trustee.

And this defendant says that the said Noble did, after due notice as provided by said decree, sell the said lands, as provided by law and said decree, and on the 16th day of March, A. D. 1861, did make, execute, and deliver his certain deeds thereof to John A. Robinson, of the town of Flatbush, Kings County, who purchased the same for this de-
42 fendant for the price or sum of nineteen hundred and fifty dollars, which was the highest price bidden for said property on said sale. That said sale was made by said Noble in good faith, under and in pursuance of the provisions of said decree in said suit, and that said purchase was made by this defendant in good faith, and this defendant denies that there was any collusion between this defendant and said Noble, or any intention on the part of this defendant to defraud said Shillaber or to do anything in the premises contrary to equity and good conscience.

And this defendant expressly denies that there is any error or mistake in said decree, but on the contrary avers that said decree is in all respects just and true, and correctly and justly adjusts the equities between said Shillaber and this defendant; and this defendant expressly denies that the deed from this defendant to said Noble, made in pursuance of said decree, was on mortgage, but on the contrary he avers that under said deed said Noble obtained title in fee to said lands.

And this defendant expressly denies that either the said Theodore Shillaber, or the said John Shillaber, ever had title to the equity of
43 redemption of said premises in Flatbush, and in Sullivan and Essex Counties, New York, or in any part thereof; and this defendant denies that there was any fraudulent connivance between said Noble and this defendant in the making of said sale, or in any other matter whatever connected with the said lands, or the sale and purchase thereof, and he denies that at the time he sold the said Flatbush lots they were worth the sum of fifteen thousand dollars, ($15,000$^{00}_{100}$) or any such sum. He admits that they had increased largely in price since

the said contract with said Shillaber, and he denies that the said lands in Sullivan and Essex Counties had increased in price considerably at the time of their sale by him, or that they were worth the sum of six thousand dollars, ($6,000.00,) or any such sum, and this defendant admits the allegations and statements contained in said bill of complaint, not hereinbefore specifically admitted or denied, down to the end of line 12, of folio 42, of said bill of complaint.

And this defendant, for answer to the first special interrogatory
44 contained in said bill, says that he has hereinbefore specifically and fully answered the same.

And for answer to the second special interrogatory, he says that said clerk did, at the expiration of said ninety days, redeliver said deed to this defendant, and the same is now in the possession of this defendant uncancelled, except by the certificate of redelivery endorsed thereon by said clerk.

And for answer to the third special interrogatory, he says that he has, since the delivery of said deeds to him by said clerk, conveyed the whole of said lands and premises in Flatbush, Kings County, New York, and in Sullivan and Essex Counties, as follows: The said lands in Flatbush to Thomas Rice, section No. 13, for $1,805; to Robert Stewart, section No. 14, and 25 feet of the west side No. 15, $4,000; and to Philip S. Crooke, 50 feet east side No. 15, for $2,000; the said lands in Sullivan County to Andrew Clark, about the year 1867, for $1,000, to best recollection of defendant; and the said lands in Essex County to Carroll, about the year 1864, for $500, to the best recollection of defendant. And that the consideration for said sales and conveyances was received as follows: $1,805 from Thomas Rice, Dec.
45 18, 1861; $4,000 from Robert Stewart, Nov. 1, 1867; $2,000 from Philip S. Crooke, Nov. 30, 1868; $1,000 from Andrew Clark, about 1867; $500 from Carroll, about 1864.

And for answer to the fourth special interrogatory, he says that he did, on the sixth day of December, A. D. 1860, execute, together with his wife, and deliver to the said Silas Noble, a deed in trust, in compliance with the decree of said court of chancery, a copy of which is annexed to this answer, marked "A," and made a part hereof, and that the original thereof is now in the defendant's possession, and which deed has never been recorded.

And for answer to the fifth special interrogatory, he says that the said Silas Noble did execute and deliver to John A. Robinson, on the 16th day of March, A. D. 1861, deeds of said lands in Flatbush, and Sullivan and Essex Counties, New York, copies of which deeds are annexed hereto, the originals of which are in the possession of this defendant. That such sales were made at public auction, at Montague Hall, in the city of Brooklyn, after having been duly advertised by said Noble.

That this defendant did pay to said Noble the whole of the purchase-money therefor, by crediting him therefor on the amount payable from him under said decree.

46 That notice of sale was published six weeks previous thereto in the Brooklyn Standard, a newspaper published in the city of Brooklyn, in Kings County, one of the counties in which said lands were situated. The notice of such sale was published once a week for six weeks immediately previous to the time of sale, March 16th, 1861, a copy of which is annexed hereto; but whether a copy of the same was served on the complainant, and if a copy was served, in what manner service was made, or whether a copy of such notice was affixed on the outside door of the building where the county courts of said Kings, Sul-

livan, and Essex counties are directed to be held, or for how long, this defendant knows not.

That the sale by said Noble of all said lands in Flatbush, Kings County, and in Sullivan and Essex Counties, was made under the deed of trust to him by this defendant hereinbefore set forth, and of the decree of the court of chancery of the State of Illinois hereinbefore set forth. And this defendant states that he never received any rents or profits from any of said lands and premises, but paid taxes thereupon; and that the deeds hereinbefore set forth from this defendant and wife to the purchasers of said lands, respectively, show what and all
47 sums of money ever received by this defendant for or on account of said lands.

And this defendant states that annexed hereto is a schedule of all deeds made by him in respect to said lands or any part thereof, which said deeds are all the conveyances or memorandums in writing ever in the possession of this defendant in connection therewith, except such as are specifically set out herein.

And this defendant submits to this honorable court that all and every of the matters in said complainant's bill mentioned and complained of are matters which may and should be settled and determined between the said complainant and this defendant in the said court of chancery of the State of Illinois in and for the county of Ogle, in the said State, and in respect to which the said complainant is not entitled to maintain this suit for relief, and this defendant hopes that he shall have the same benefit of this defence as if he had demurred to the said complainant's bill.

And this defendant denies all unlawful combination and confederacy in the said bill charged, without that, that any other matter or
48 thing material or necessary for this defendant to make answer unto, and not herein or hereby well or sufficiently answered unto, confessed or avoided, traversed or denied, is true to the knowledge or belief of this defendant.

All which matters and things this defendant is ready to aver, maintain, and prove as this honorable court shall direct, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

JOHN ROBINSON,
PHILIP S. CROOKE,
Sol'r for Defendant.

JOHN H. BERGEN,
Of Counsel.

EASTERN DISTRICT OF NEW YORK, *ss:*

John Robinson, defendant in the within answer named, being duly sworn, doth depose and says, that he has heard the foregoing answer read, and knows the contents thereof, and that the same are true of his own knowledge, except as stated on information and belief, and as to those matters he believes them to be true.

JOHN ROBINSON.

Sworn to before me this 9th day of May, A. D. 1872.

D. C. WINSLOW,
U. S. Comr.

49 This indenture, made the sixth day of December, in the year one thousand eight hundred and sixty, between John Robinson,

of Flatbush, in the county of Kings, in the State of New York, and Samuella B., his wife, parties of the first part, and Silas Noble, of , in the State of Illinois, party of the second part, witnesseth that the said parties of the first part, for and in consideration of the sum of seven thousand dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part, his successor and assigns, forever, all those three sections or lots situated on Clarkson street, in said town of Flatbush, in the county of Kings, and State of New York, owned by said John Robinson, party hereto of the first part, and which are numbered thirteen, (13,) fourteen, (14,) fifteen, (15,) on a map of forty-five plots of land on the same street, the said three lots of lands being each seventy-five (75) feet in width front and rear, and about two hundred and
50 forty-seven (247) feet in depth; also all that certain tract of land, of four hundred and twenty acres of land, ow'ed by said John Robinson, and situate in the town of Fallsburgh, in the county of Sullivan, and State of New York, be the same more or less, the said tract being part of lot four, in great lot number one, in Hardenburgh's patent made May, 1847, by J. O. Dunning, surveyor; and also all that certain tract of land, owned by said John Robinson, of seventy-four (74) acres of land, situate, lying, and being in the town of Minerva, in the county of Essex, and State of New York, the premises hereby conveyed and intended to be conveyed, being the same premises which are referred to in a certain decree made by the circuit court within and for the county of Rock Island, in the State of Illinois, in chancery, on the twentieth day of September, A. D. 1860, as by reference thereto will more fully and at large appear; this deed being executed in obedience to and in conformity with said decree, and to carry out the requirement and provisions thereof; together with all and sigular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and
51 remainders, rents, issues, and profits thereof; and also all the estate, right, title, and interest, dower, and right of dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, and to the same, and every part and parcel thereof, with the appurtenance thereunto belonging or in any wise appertaining; to have and to hold the above-granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, his successors and assigns, upon the special trust and confidence that he, the said party of the second part, shall proceed to sell and convey, in fee-simple, all and singular the above-described lots, pieces, parcels, and tracts of lands in such manner, and after giving such notice of the time and place of such sale, as may be usual or provided by law in the State of New York, and that he, the said party of the second part, shall make, execute, and deliver to the purchaser or purchasers thereof good and sufficient legal titles for the same, and every part thereof, and out of the proceeds arising therefrom shall pay, first, the expenses attendant upon the execution of this trust; second, after the payment of said expenses, the party of the
52 second part shall pay to the party of the first part, viz, to the said John Robinson, or to his legal representatives, out of the residue of the monies arising from the proceeds of such sales of said lands, the said sum of four thousand two hundred and forty-nine dol-

lars and fifty-eight cents, with interest thereon from the twentieth day of September, one thousand eight hundred and sixty, or so much thereof as may be due; and if any balance shall then be and remain unappropriated, he, the party of the second part, shall hold the same subject to the further order of the circuit court in and for Rock Island County, in the State of Illinois, either to be paid to the said Theodore Shillaber, described in said decree, or to be applied by the said Silas Noble in the payment of the debts of the estate of John Shillaber, deceased, allowed against the said estate, and to be paid by said Silas Noble, as administrator thereof of said estate, out of assetts in his hands to be administered as the said circuit court in and for said county of Rock Island shall direct.

And the said John Robinson, for himself and his heirs, executors, and administrators, doth covenant, grant, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the delivery hereof the said part' of the first part was the lawful owner of the premises above granted, and was seized thereof in fee simple
53 absolute; and that he will warrant and defend the above-granted premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns for ever.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

JOHN ROBINSON. [L. S.]
SAMUELLA B. ROBINSON. [L. S.]

Sealed and delivered in the presence of—
JOSEPH G. WILSON.
CHAS. A. JOURDAN.

STATE OF NEW YORK,
County of Kings, ss:

On this seventh day of December, in the year of our Lord one thousand eight hundred and sixty, before me personally came John Robinson and Samuella B. Robinson, his wife, to me known to be the individuals described in, and who executed, the within deed, who severally acknowledged that they executed the same for the purposes therein mentioned; and Samuella B. Robinson, the wife of said John Robinson, on a private examination apart from her husband, acknowledged to me that she executed said deed freely and without any
54 fear or compulsion of her said husband.

JOSEPH G. WILSON,
Comr. of Deeds.

STATE OF NEW YORK,
County of Kings, ss:

I, Charles W. Thomas, clerk of the county of Kings, do hereby certify that Joseph G. Wilson, whose name is subscribed to the certificate of proof or acknowledgement of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgement a commissioner of deeds in and for the city of Brooklyn, in said county, dwelling in said city, commissioned and sworn and duly authorized to take the same; and further that I am well acquainted with the handwriting of such commissioner, and verily believe the signature to the said certificate of proof acknowledgement is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said county this 8th day of December, 1860.

[KINGS COUNTY SEAL.] C. W. THOMAS, *Clerk.*

55 (Indorsed:) Com. John Robinson & wife to Silas Noble. Copy trust & deed.

56 This indenture, made the sixteenth day of March, in the year one thousand eight hundred and sixty-one, between Silas Noble, of Dixon, in the county of Lee, in the State of Illinois, trustee, under and by virtue of a certain deed of trust, bearing date the sixth day of December, 1860, executed by John Robinson and Samuella B., his wife, of Flatbush, in the county of Kings and State of New York, to the said Silas Noble, party of the first part, and John A. Robinson, of Flatbush, aforesaid, party of the second part.

Now this indenture witnesseth that the said party of the first part, for and in consideration of the sum of four hundred and ninety-four dollars lawful money of the United States of America to him in hand paid at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey, and confirm, unto the said party of the second part, all that certain tract of land of four hundred and twenty acres of land heretofore owned by John Robinson, and situate in the town of Fallsburgh, in the county of Sullivan and State of New York, be the same more or less, the said tract being part of lot four in great
57 lot number one in Hardensburg's patent, made May, 1847, by J. O. Dunning, surveyor, and also all that certain tract of land heretobefore owned by said John Robinson, of seventy-four (74) acres of land situate, lying, and being in the town of Minerva, in the county of Essex and State of New York, being a part of the premises conveyed to the said Noble in and by the said trust deed, together with all and singular the tenements, hereditaments, and appurtenances unto the same belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, claim, and demand whatsoever, as well at law as in equity, of the said party of the first part under or by virtue of the said trust deed, or otherwise, of, in, and to the same, and every part and parcel thereof, to have and to hold the above-mentioned and described premises hereby granted and conveyed, or intended so to be, with the appurtenances, unto the said party of the second part, his heirs, and assigns, to his and their only proper use, benefit, and behoof forever. And the said party of the first part does hereby for himself, his heirs, executors, and administrators, covenant, promise,
58 and agree, to and with the said party of the second part, that the said party of the first part has not at any time made, done, committed or caused any act, matter, or thing whatsoever whereby or by means whereof the said premises hereby granted and released as aforesaid, or any part thereof, are or can in anywise be impeached or incumbered in title, charge, estate, or otherwise; and also that the said party of the second part, his heirs and assigns, shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess, and enjoy the above granted, bargained, and described premises, and every part and parcel thereof, with the appurtenances, and receive and take the rents, issues, and profits thereof, to and for his and their own proper use and benefit, without any let, suit, hinderance, molestation, eviction, or denial of, from, or by the said party of the first part, his heirs, or assigns, or of, from, or by any other person or persons whomsoever, lawfully claiming or to claim any estate, right, title, or interest of, in, or to the same by, from, or under them, or either of them.

In witness whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

59 SILAS NOBLE, [L. S.]
Trustee.

Sealed and delivered in the presence of—
FREDERICK BULL.

CITY AND COUNTY OF NEW YORK, *ss:*

On the eighteenth day of March, one thousand eight hundred and sixty-one, before me personally appeared Silas Noble, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that he executed the same.

FREDERICK BULL,
Commr. of Deeds.

(Indorsed:) Silas Noble, trustee, to John A. Robinson. Copy deed.

60 This indenture, made the sixteenth day of March, in the year one thousand eight hundred and sixty-one, between Silas Noble, of Dixon, in the county of Lee, in the State of Illinois, trustee under and by virtue of a certain deed of trust bearing date the sixth day of December, 1860, executed by John Robinson and Samuella B., his wife, of Flatbush, in the county of Kings and State of New York, to the said Silas Noble, party of the first part, and John A. Robinson, of Flatbush aforesaid, party of the second part.

Now this indenture witnesseth, that the said party of the first part, for and in consideration of the sum of fifteen hundred dollars lawful money of the United States of America, to him in hand paid at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey, and confirm, unto the said party of the second part, all those three sections or lots situate on Clarkson street, in said town of Flatbush, in the county of Kings and State of New York, heretofore owned by John Robinson, and which are numbered thirteen, (13,) fourteen, (14,) fifteen, (15,)on a map of forty-five plots of land
61 on the same street; the said three lots of land being each seventy-five (75) feet in width, front and rear, and about two hundred and forty-seven (247) feet in depth; being a part of the premises conveyed to the said Noble in and by the said trust-deed, together with all and singular the tenements, hereditaments, and appurtenance' unto the same belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

And also all the estate, right, title, interest, property, claim, and demand whatsoever, as well at law as in equity, of the said party of the first part under or by virtue of the said trust-deed or otherwise of, in, and to the same, and every part and parcel thereof; to have and to hold the above mentioned and described premis·s hereby granted and conveyed, or intended so to be, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their only proper use, benefit, and behoof, forever.

And the said party of the first part does hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said party of the second part that the said party of the first part

has not at any time made, done, committed, or caused any act,
62 matter, or thing whatsoever whereby or by means whereof the said premises hereby granted and released as aforesaid, or any part thereof, are or can in any wise be impeached or encumbered in title, charge, estate, or otherwise.

And also that the said party of the second part, his heirs and assigns, shall and may at all times hereafter peaceable and quietly have, hold, use, occupy, possess, and enjoy the above granted, bargained, and described premises, and every part and parcel thereof, with the appurtenances, and receive and take the rents, issues, and profits thereof to and for his and their own proper use and benefit, without any let, suit, hinderance, molestation, eviction, or denial, of, from, or by the said party of the first part, his heirs or assigns, or of, from, or by any other person or persons whomsoever lawfully claiming or to claim any estate, right, title, or interest of, in, or to the same by, from, or under them, or either of them.

In witness whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

SILAS NOBLE, *Trustee.* [L. S.]

Sealed and delivered in the presence of—
FREDERICK BULL.

CITY AND COUNTY OF NEW YORK, *ss:*

63 On the eighteenth day of March, one thousand eight hundred and sixty-one, before me personally appeared Silas Noble, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that he executed the same.

FREDERICK BULL,
Comm'r of Deeds.

(Indorsed:) Silas Noble, trustee to John A. Robinson. Copy deed.

64 *Schedule of deeds referred to in the answer.*

JOHN ROBINSON & WIFE to THOMAS RICE.	Deed dated December 18, 1861. Consideration, $1,805. Conveys section No. 13.
THE SAME to ROBERT STEWART.	Deed dated November 1, 1867. Consideration, $4,000. Conveys section No. 14, and part of No. 15.
THE SAME to PHILIP S. CROOKE.	Deed dated November 30, 1868. Consideration, $2,000. Part of No. 15.
THE SAME to ANDREW CLARK.	Deed dated Consideration, $1,000.
THE SAME to CARROLL.	Deed dated Consideration, $500.

65 *Trustee's sale of lands in the counties of Kings, Sullivan, and Essex, in the State of New York.*

In pursuance of a trust-deed, the subscriber will sell, at public vendue, on the 16th day of March, 1861, at 12 o'clock noon, at Montague Hall, in the city of Brooklyn, in the county of Kings, the following parcels of land:

1st. Three lots of land, each seventy-five by 247 feet, fronting on Clarkson street, in the village of Flatbush, in the county of Kings, numbered 13, 14, and 15, being the same premises conveyed by Dudley Selden and James Mowatt to Elijah H. Kimball by deed dated 20th June, 1843, and recorded in the Kings County clerk's office.

2d. About 420 acres of land in the town of Fallsburgh, near Sandburgh post-office, in Sullivan County, New York, and is the west part of lot No. 4 in great lot number 1 of the Hardenburgh patent.

3d. About seventy-four acres of land in the town of Minerva, township No. 26, Essex County, New York, and known as the southerly part of lot 86.

Terms of sale, cash. Trustee's deeds will be executed for each parcel.

Dated January, 1861.

SILAS NOBLE, *Trustee, &c.*

66 (Indorsed:) Circuit court of the United States, eastern district of New York. Theodore Shillaber, complainant, vs. John Robinson, defendant. Answer. Philip S. Crooke, sol'r for deft. Filed May 10th, 1872.

67 Circuit court of the United States, eastern district of New York.

THEODORE SHILLABER, COMPLAINANT,
vs.
JOHN ROBINSON, DEFENDANT.

Exceptions taken by the said complainant to the insufficient answer of the said defendant to the said complainant's bill of complaint.

First. For that the said defendant has not, in his answer to the third special interrogatory of said bill, to the best of his knowledge, remembrance, information, and belief, answered and set forth to what particular person or at what particular time or date, or for what sum of money, he sold the said lands in Sullivan County, State of New York.

Second. For that the said defendant has not, in his answer to the said third special interrogatory, to the best of his knowledge, remembrance, information, and belief, answered and set forth to what particular person, or at what particular time or date, or for what sum of money he sold the said lands in Essex County, State of New York.

68 Third. For that the said defendant has not to the best of his knowledge, remembrance, information, and belief, answered whether either of the said deeds to Andrew Clark, or to Carroll, a description whereof is set forth in a schedule annexed to his said answer, or whether any note, memorandum, or writing relating in any manner to either of said deeds, or to the lands therein respectively described or supposed to be described, or to the sale of either of said tracts of land, is now in the possession or in the power of the said defendant.

In all which particulars the said complainant excepts to the answer of the said defendant as evasive, imperfect, and insufficient, and humbly

pray' that the said defendant may be compelled to put in a full and sufficient answer to the said bill of complaint.

New York, May , 1872.

COLES MORRIS,
Sol'r for Compl't.

COLES MORRIS,
Of Counsel for Compl't.

(Indorsed:) U. S. circuit court. Theodore Shillaber vs. John Robinson. Compl't's exceptions to deft.'s answer. Coles Morris, solr. complt., 15 Nassau st., N. Y. Filed May 31st, 1872.

69 Circuit court of the United States for the eastern district of New York.

THEODORE SHILLABER
against
JOHN ROBINSON.

The further answer of the defendant, John Robinson, to the original bill of complaint of Theodore Shillaber.

This defendant, John Robinson, answers that he sold the said lands in Sullivan County, State of New York, on the seventh day of June, A. D. 1865, to Elizabeth Clarke for the sum of twelve hundred dollars.

That he sold the said lands in Essex County, State of New York, to John Carle, junior, on the twenty-eighth day of January, A. D. 1863, for the sum of six hundred and twenty-three dollars and seventy-two cents.

That neither of the said deeds to Elizabeth Clarke nor to John Carle, junior, nor any note, memorandum, or writing relating in any manner to either of said deeds, or to the lands therein respectively described or supposed to be described, or to the sale of either of said tracts of land, is now in the possession or in the power of the said defendant.

70 And that this further answer is made on inspection of the record of deeds of said two pieces of property recorded respectively in the clerk's offices of Sullivan and Essex Counties, State of New York, and on the information obtained therefrom which this defendant did not have when the original answer herein was put in by defendant.

JOHN ROBINSON.

PHILIP S. CROOKE,
Solicitor for Defendant.
JOHN H. BERGEN,
Of Counsel.

EASTERN DISTRICT OF NEW YORK, *ss:*

John Robinson, defendant in the within answer named, being duly sworn, doth depose and say that he has heard the foregoing further answer read and knows the contents thereof; that the same are true of his own knowledge except as stated on information and belief, and as to those matters he believes the same to be true.

JOHN ROBINSON.

Sworn before me this 26th day of June, A. D. 1872.
[NOTARIAL SEAL.]
FRANK CROOKE,
Notary Public.

71 (Indorsed:) U. S. circuit court. Theodore Shillaber vs. John Robinson. Further answer. Filed June 26th, 1872.

72 Circuit court of the United States, eastern district of New York.

To the judges of the circuit court of the United States for the eastern district of New York.

The replication of Theodore Shillaber, complainant, to the answer and further answer of John Robinson, defendant.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer and further answer, for replication thereunto says he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer and further answer of the said defendant are uncertain and untrue and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer or further answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

COLES MORRIS,
Solr. for Complt.

73 (Indorsed:) U. S. circuit court, e. d. of New York. Theodore Shillaber, complainant, vs. John Robinson, defendant. Replication. Coles Morris, solr. for complt. Filed August 5th, 1872.

74 JOHN ROBINSON, COMPLAINANT,
vs.
THEODORE SHILLABAR, SILAS NOBLE, ADM. of John Shillaber, Thomas R. Colledge, and Joseph B. Brooks, defendants. } In chancery.

OCTOBER 1, 1858.

At this day came the parties, by their solicitors, and by their agreement filed and attached to the transcript of the record in the above cause, in the county of Ogle, it is ordered by the court that the interlocutory decree attached to the said transcript, and referred to in the certificate of the clerk attached thereto, as marked I, be filed and entered of record in this cause as of the October term, A. D. 1855, at the Ogle County circuit court, it being agreed by said parties, by their said solicitors, that the said decree was in fact entered as of said term of said court, and which said decree is in the words and figures following, to wit:

Of the October term of the Ogle County circuit court, A. D. 1855. In chancery.

JOHN ROBINSON
vs.
THEODORE SHILLABAR, THOMAS R. Colledge, Joseph B. Brooks, and Silas Noble. } Bill for specific performance of a contract.

75 This day came the said complainant, by Heaton and Atherton, his

solicitors, and the said defendants, by Eustace, their solicitor; and, on motion of said complainant, it is ordered that the cause be set down for hearing on the original amended and supplemental bills, answers, replications, depositions, proofs, and exhibits; and on motion of the said complainant, and by the agreement of the parties complainant and defendant, by their aforesaid solicitors, by them made in open court, it is further ordered that this cause be heard before the judge of this court, at some time and place to be appointed by him during the ensuing vacation, and that upon such hearing the said judge shall make a decree in this cause, to be entered of record as of the present term of this court; and afterwards, to wit, on the 26th day of October, A. D. 1855, in the vacation and following the October term of said court, came before the honorable J. Wilson Drury, judge of said court, sitting as such judge at chambers, the *the* said complainant and the said defendants, and submitted their respective proofs and allegations therein, and the said complainant having duly proved and introduced in evidence the original contract mentioned in complainant's original bill between the complainant and the said John Shillaber, in said original bill ren-
76 dered, and also the depositions and other proofs on file in this cause, and the said cause being fully heard on the pleadings and proofs herein, and it appearing to the court from such pleadings and the proofs produced to the court that the said complainant and the said John Shillabar did make and enter into the written contract and agreement for the sale of the lands set out in the said original bill; that the said John Shillaber died intestate at the time mentioned in the complainant's supplemental bill; that the said Theodore Shillabar is his only and sole heir at law, and that letters of administration of his estate have been in due form of law granted to the said Silas Noble, a defendant herein, by the county court of Ogle County; that the said John Shillabar, in his life-time, and the said Theodore Shillabar, his heir at law, since his decease have unreasonably neglected, failed, and refused to perform said contract, and that the said complainant has been at all times ready, willing, and desirous to perform the same on his part, and that there ought to be a specific performance of the same:

It is ordered, adjudged, and decreed that the said contract and
77 articles of agreement in said original bill set out be enforced, carried into effect, and specifically performed according to the true intent and meaning thereof; that the said complainant convey to the said Theodore Shillaber, only heir at law of said John Shillaber, the several tracts of land in such contract mentioned, or such of the same as he can make a good and perfect title to, to wit, three sections or lots of land situate in Flatbush, Kings County, State of New York; a tract of about one hundred and twenty acres of land situate in the town of Fallsburgh, in Sullivan County, in the same State, near Lindburg post-office, and a tract of about seventy-four acres of land situated in the town of Minerva, Essex County, in New York; that upon the execution and delivery of each conveyance by the complainant to the said Theodore Shillabar, as above decreed, and the payment and security of the residue of the purchase-price of said land, sold by said Shillabar to said complainant in and by said contract, as hereinafter provided and required, the said Theodore Shillabar execute, make, and deliver to the complainant good and sufficient deeds of conveyance, with apt and proper covenants herein, in which all necessary parties shall join,

to convey and assure to the complainant in fee-simple all the right,
78 title, and interest which the said Theodore Shillabar has ever or can have as sole heir at law of *the land* John Shillabar, in and to the

land in complainant's original bill described as La Grange, Buena Vista, Belleview, and the Bluff, being all the land of the said John Shillabar, did in the counties of Lee and Ogle in the State of Illinois. And it appearing to the court that the conveyance made by the said John Shillabar, *at* his life-time, to the *land* Joseph B. Brooks, a defendant herein, conveying to him the several parcels of land called Buena Vista, and described in the answer of said Brooks, was a voluntary conveyance, without any consideration whatever and in fraud of the first rights of the said complainant, it is ordered and decreed that the said Joseph B. Brooks, by good and sufficient deed of conveyance, in which all proper parties shall join, convey the said lands described in his said answer, and known as Buena Vista, as aforesaid, to the complainant, upon a full performance by the said complainant on his part of said contract; and it further appearing to the court by the pleadings and by the proofs submitted to the court that the said deed made by the said John
79 Shillaber, in his life-time, to the said Thomas Richardson Colledge, conveying therein fourteen hundred and fifty-two acres and sixty-four one-hundredths of an acre of land, part of the land in said contract described as La Grange, bearing date October 14th, 1846, referred to and mentioned in complainant's amended and supplemental bill, and in the answer of the said defendant Colledge, filed herein, was made and delivered by the said parties as a mortgage security, to secure the payment of a certain sum of money then due and owing by the said Shillaber to the said Colledge, is hereby declared by the court to be a mortgage security only, and it is hereby declared that the same is entitled to no other force or effect whatever against the complainant and his rights in and to said land, and that the said complainant, upon the payment by him to the said Colledge of the amount or sum of money that may be due from the said Shillabar and his representatives, and which amount said mortgage was given to secure, and which remains due and unpaid thereon, or upon the payment of the same into court by
80 the said complainant for the use of the said Colledge, and upon the performance of said original contract by the complainant, is entitled to a full and complete conveyance and release from the said Colledge of all right, title, and interest he may have in said lands conveyed to him as aforesaid by said Shillabar, and that upon each payment and performance by said complainant the said Colledge fully and effectually release and convey said lands to said complainant; and it is further ordered and decreed that the said complainant pay into court for the use of such parties as may be entitled thereto such amount of ready money as is and shall be found due and now payable from the said complainant under and by virtue of the original contract in said original bill set forth; and it is further ordered and decreed that the said complainant make, execute, and deliver to the said defendant, Silas Noble, administrator of the estate of the said John Shillabar, dec'd, in due form of law, a mortgage upon the farm and premises in the town of Flatbush, county of Kings, and State of New York, of the said complainant, and upon which he resided at the date of said original
81 contract, to secure the residue of the purchase-money mentioned in said contract, and interest thereon at the rate of six per cent. per annum, together with the personal bond of the said complainant, payable within five years from the date of said contract set forth and thereby required; and it is further ordered and decreed by the court that this cause be referred to Joseph Lewis, esq., as a special master of this court, to take further testimony herein; that he give to the said parties or their solicitors notice of the time and place when and where

he will proceed to take such testimony and hear the further proofs and allegations of the parties, and that he report his doings herein to the next or to some subsequent term of this court, and he is hereby directed and required to inquire and report to the court as follows: First. That he ascertain, inquire, and report the particular descriptions of the lands described in said contract as La Grange, Buena Vista, or Belleview, and the Bluff, by their several legal descriptions and subdivisions, or
82 otherwise by apt, proper, sufficient words, and that he also inquire and report the condition of the title of said lands and such of them, and the incumbrances thereon. Second. That he also inquire and report what number of acres, with a particular description of the sum as aforesaid, including those conveyed to the said Thomas R. Colledge, included within and described as La Grange, or formerly a part thereof, did the said John Shillabar die seized of, and whether a good and perfect title can be made to the same or to a part thereof, with a particular description of such parts of the same for which a good and perfect title can be made, and also what sum of money the said lands will amount to at the price per acre named in said contract. Third. What number of acres of land, with a particular description thereof, as aforesaid, in the tract known as Buena Vista or Belleview, can the defendants, or any of them, make a good and perfect title to the complainant, and to what sum of money will the same amount to at the price per acre mentioned in said contract.

Fourth. What number of acres of land, with a particular descrip-
83 tion thereof, as aforesaid, in the tract known as the Bluff, can the said defendants, or any of them, make a good and perfect title to the complainant, and the sum of money the same will amount to at the price per acre mentioned in said contract.

Fifth. What sum of money is due to the said Thomas R. Colledge, or his said above mortgage security, including interest from the date thereof.

Sixth. What amount of *suits* and profits have been received by the said Colledge for the use of and from the said lands mentioned in said deed to him, since the date thereof, and what amount has he received in the produce of said land from the use and occupation thereof, and what amount has been paid in any manner on said mortgage, and how and where the same was paid.

Seventh. Whether the said complainant can make a good and perfect title to the said lands above mentioned and by said contract to be conveyed to the said Shillabar by the said complainant, or any of it, and what part thereof; and that he also inquire and report the condition of the title of the said lands, and the incumbrances on the
84 same, or any of them.

Eighth. That he also inquire and report the condition of the title of the lands above and in said contract mentioned upon which the complainant herein agreed to make to the said John Shillabar a second mortgage, and the incumbrances *their* are upon the same; and it is further ordered that all questions in this cause and not herein above expressly adjudged, and all questions of detail arising herein for the more complete and perfect carrying out and enforcing the right of the parties herein according to their right as above declared, and all questions of further direction involved herein, be, and they are hereby, expressly reserved until the coming in of said master's report, and that this cause stand continued.

(Signed) J. W. DRURY.

(Endorsed:) U. S. circuit court eastern dist. of New York. Theodore Shillaber ag'st John Robinson. Copy interlocutory. Decree of the court of chancery, State of Illinois. Coles Morris, solr. for comp't.

85 Chancery, September term, 1860.

At a circuit court, sitting as a court of chancery, began and held at the court-house in the city of Rock Island, within and for the county of Rock Island and State of Illinois, on the second Monday, being the tenth day of September, A. D. 1860, before the honorable J. H. Howe, judge of the sixth judicial circuit of the State of Illinois and presiding judge of said circuit court.

Present: Hon. J. H. Howe, judge; Moses D. Merrill, sheriff; Quincy McNeal, clerk.

JOHN ROBINSON, COMPLAINANT, *vs.* THEODORE SHILLABAR, SILAS NOBLE, ADMINistrator of the estate of John Shillaber, dec'd; Oliver Evirith, adm. of the estate of Joseph B. Brooks, dec'd; Ophilia A. Brooks, widow and heir; Henry J. Brooks and Margaret P. Brooks, heirs of Joseph P. Brooks, deceased, and Thomas R. Colledge, defendants.	6½.	In chancery.

86 SEPTEMBER 20TH, 1860.

Whereas this cause was by order of this court, made at the last term thereof, set for hearing before the judge of this court, at his chambers at Kewanee, on the 18th day of July last, and the same coming up for hearing, the complainant appearing by his solicitors herein, and the defendant Colledge by Grokins, his solicitor, and the motion of said Colledge coming up for hearing, being to vacate and strike from the files certain papers filed and entered in this cause, and the court having heard the arguments of the said solicitors, and having also taken certain testimony filed herein, said cause was ordered to be continued to the present term of this court, with leave to the parties to take further testimony; and the court now being sufficiently advise' as to said motion so heard and argued before him, it is now ordered that the same be overruled. And now afterwards, on this day, this cause came on to be heard, and the said complainant appearing by Wilkinson and Pleasants, and W. W. Heaton, his solicitors, and the court hav-
87 ing now fully inspected the pleadings and evidence, proofs and exhibits of the parties submitted herein, all of which evidence upon said hearing, as well as upon the interlocutory decree heretofore made and entered herein, was exhibited in writing and filed, or referred to in this cause, and having inquired into and ascertained the several matters and things mentioned and referred to and required to be ascertained in and by the interlocutory decree made in this cause, of the October term, A. D. 1855, of the Ogle County circuit court, doth now find and adjudge that the lands mentioned and referred to in the contract between the complainant and John Shillabar, now deceased, and proved in evidence herein as being known and called, respectively, La Grange, Buena Vista, or Bellview, and the Bluff, are, by their several legal and proper descriptions, designated and described as follows, to wit: The northwest quarter of section one, the north half of the northwest quarter of section two, in township twenty-two north, of range

eight east, of the fourth p. m.; the east half of the southwest quarter and the west half of the northwest quarter of section six,
88 in township twenty-two north, of range nine east, of the fourth p. m.; the southwest quarter of section twenty-five, and the west half of the northeast quarter, and the southeast quarter of the northeast quarter, and the east half of the southeast quarter, all in section thirty-five, and all of section thirty-six, all in township twenty-three north, of range eight east, of the fourth p. m.; also the west half of the southwest quarter of section thirty-one, in township twenty-three north, of range nine east, of the fourth p. m., all of said lands so described being known as La Grange. Also the east half of the northwest quarter, and the east half of the southwest quarter, and the southwest quarter of the southeast quarter, all in section seven, in township twenty-two north, of range nine east, of the fourth p. m. Also the east half of the southeast quarter of section twelve, in township twenty-two north, of range eight east, of the fourth p. m., being parts of the premises known as Buena Vista or Belleview, and all of the lands above described being in the county of Ogle and State of Illinois. Also
89 the west half of section eighteen, and the northeast quarter of said section eighteen, all in township twenty-two north, of range nine east, of the fourth p. m., being residue of the property known as Buena Vista or Bellview, and situate in the county of Lee and State of Illinois. Also the southwest fractional quarter, south of Rock River, of section twelve, except about twenty-six acres of the east side thereof owned by Silas Noble, said remaining fractional part containing about seventy and forty-three hundre'ths acres, ($70\frac{43}{100}$,) and also the northwest fractional quarter of section twelve, south of said Rock River, supposed to contain fourteen acres and one-half acre; the northwest quarter of section thirteen, the northeast quarter of section fourteen, and the southwest quarter of the southeast quarter of said section fourteen, and the northeast quarter of the northeast quarter of section twenty-three, and the north half of the northwest quarter of section twenty-four,
90 and the southeast fractional quarter, south of Rock River, of section eleven, said fraction supposed to contain fifty-eight acres, all in township twenty-one north, of range eight east, of the fourth p. m.; all of the said last-mentioned lands being known as the "Bluff," and situate in the county of Lee and State of Illinois, and containing about six hundred and twenty-two acres. That the said John Shillabar died seized of all the lands and premises above mentioned and described as "La Grange," and amounting to fourteen hundred and fifty-two $\frac{64}{100}$ acres, and also of all the lands above described as situate in the county of Ogle and State of Illinois, and embraced in what is known as Buena Vista or Belleview and containing two hundred and eighty acres; that the said lands known as La Grange are subject to the mortgage in favor of Thomas Colledge in this cause mentioned, and the said lands situate in Ogle County, and being part of Buena Vista, or Belleview, are subject to the voluntary conveyance to Joseph B. Brooks in this cause mentioned, and that none of the said lands situate in said Ogle County
91 of which the said John Shillabar died seized are subject to any other lien or incumbrance whatsoever, and that a good title can be made thereto; that the lands above described and known as the Bluff, and also those described as being part of Buena Vista, or Belleview, and situate in the county of Lee, were subject to incumbrances at the time of making the contract herein between the complainant and John Shillabar, under and by virtue of which incumbrances the said lands have since been sold and the title thereto passed beyond redemp-

tion; that the lands above described, and to which a good title can be made, amount to seventeen hundred and thirty-two $\frac{64}{100}$ acres, and which at the contract-price of six dollars and seventy-five cents per acre therefor amount to the sum of eleven thousand six hundred and ninety-five dollars and thirty-two cents, ($11,695.32,) from which amount the sum of three thousand dollars being deducted for the price of the three lots of complainant on Clarkson street, in the village of Flatbush, Kings County, and State of New York, and the further sum of four
92 thousand dollars for the price of complainant's lands in Sullivan and Essex Counties, New York, and for all of which the complainant is able a good and unincumbered title, leaves a balance of four thousand six hundred and ninety-five dollars and thirty-two cents ($4,695.32) to be paid by complainant on the La Grange and Buena Vista lands aforesaid, situated in said Ogle County, and that the interest on said sum up to this twentieth day of September, (A. D. 1860,) eighteen hundred and sixty, amounts to the sum of twenty-two hundred and thirty-six dollars and fifty-three cents, ($2,236.53,) making a total balance on said purchase of six thousand nine hundred and thirty-one dollars and eighty-five cents, ($6,931.85;) that the amount of money loaned by the defendant Thomas R. Colledge to the said John Shillaber was three thousand dollars; that by an agreement between the said parties the amount of the indebtedness from the said John Shillaber to
93 the said defendant Colledge, for principal and interest, up to the seventh day of May, one thousand eight hundred and fifty-three, was eight hundred and sixty-five pounds sterling, and being equal to the sum of four thousand one hundred ninety-five dollars and twenty-five cents, (4,195.25;) that the interest that has accrued thereon up to this day (September 20th A. D. 1860) amounts to the further sum of one thousand eight hundred and fifty-five dollars, making the whole amount of said mortgage-indebtedness at this date the sum of six thousand and fifty dollars and twenty-five cents, ($6,050.25;) that said Colledge took possession of said lands included in his said mortgage-deed on the first day of April, A. D. eighteen hundred and fifty-five; that he has continued to occupy and use the land as his own property, and to receive the rents, profits, and income therefrom for four successive years, from the spring of said year A. D. eighteen hundred and fifty-five to the spring of the year A. D. eighteen hundred and fifty-nine, including what there was in said spring of the year eighteen
94 hundred and fifty-five of said lands so occupied by said Colledge, about four hundred and fifty acres then subject to cultivation, and which had been previously plowed and cultivated, and which was inclosed with a fence; that there was also on said lands about forty acres of clover and about forty acres of clover and timothy grass enclosed with a fence and growing on said lands, and also a pasture-field of about sixty acres, enclosed also; that there was a large orchard on said premises, also about two hundred acres of timber-land for the use of said place, also a large amount of natural meadow and water for the use of stock on said premises; that the actual rental value of said premises which was or should have been received by said Colledge, with reasonable care, diligence, and cultivation in the use and occupation of said premises, and for which he should account herein, amounts to the
95 sum of three thousand dollars ($3,000.00) for the time he so occupied said premises, for the lands under fence and subject to cultivation, throwing in the use of all the other lands and improvements as accessory thereto, and which amounts is a just and equitable set-off against the amount due on the said mortgage, and entitled to be allowed

and applied as a credit thereon; that said Thomas H. Colledge paid on the twenty-first day of July, eighteen hundred and fifty-nine, to the proper authorities to receive the same, the amount of three hundred and ninety-four dollars and forty-one cents to redeem said La Grange from a sale for taxes due thereon made on the eleventh day of May, A. D. 1858, and for the taxes of said year A. D. 1858; that the interest on said sum so paid to this date amounts to the sum of twenty-seven dollars and sixty cents, making in all the sum of four hundred and twenty-two dollars and one cent, and which sum so paid, together with said interest thereon, said Colledge should be allowed and credited, and be allowed to take, added to the amount due on said mortgage; that
96 after adding said sum to the aforesaid amount now due on said mortgage, and deducting therefrom the amount so chargeable to him for rents and profits for the use of said lands, there yet remains due to said Colledge, on his said mortgage, the sum of three thousand four hundred and seventy-two $\frac{26}{100}$ dollars, ($3,472.26;) that the said John Shillaber, during his life-time and up to the time of his decease, received the rents and profits of the said lands known a' La Grange, and that the defendant, Theodore Shillaber, received the rents and profits thereof from the time of the decease of the said John Shillaber up to the first day of April, A. D. 1855, and that there was under cultivation of said farm, in the year A. D. 1853, four hundred and fifty acres of land, of the yearly value of three dollars per acre, so that there was under cultivation on said land, during the year A. D. 1854, four hundred and fifty acres of said land, of the yearly value of three dollars per acre;
97 that the said John Shillaber was in possession of said lands until the time of his decease, and *as* about the twenty-first day of September, one thousand eight hundred and fifty-three, and that the proceeds of the crops raised on said farm during said year were personal property of the said John Shillaber, and as such are a charge against the estate of said Shillaber in the hands of said defendant Silas Noble, to be administered upon, and that the proceeds of said crops and emblements so cultivated upon said La Grange farm for the year A. D. 1854 were received by and are properly a charge against the said Theodore Shillaber, but that the complainant is equitably entitled to have the sum paid or allowed to him as a part of and on account of the consideration to be by him paid for said lands; that the amount so chargeable against the personal representatives of said John Shillaber is thirteen hundred and fifty dollars, and the amount so chargeable against the said
98 Theodore is thirteen hundred and fifty dollars; that the whole amount which the said complainant is entitled to be credited and allowed upon his said contract for said two years' use and occupation is twenty-seven hundred dollars.

And the court doth further find, from the evidence herein, that the said complainant has suffered damage in preparing to execute the said contract on his part, and to take possession of the said land, in the sum of five hundred eighty-one dollars for salary, board, and travelling expenses of Mr. T. Dixon, and in the further sum of forty-two dollars for cuttings and seeds and working; together the sum of six hundred and twenty-three dollars.

And the court doth further find that since the death of the said John Shillaber there has been taken and removed from or destroyed on said premises known as La Grange, over and above ordinary wear and tear, loss and depreciation, fences, sheds, and other improvements of the value of five hundred dollars, and that there has been timber and wood

standing and growing upon said land cut down, taken off, and removed, and not applied for the use of said farm, of the value of two hundred and twenty-two dollars, all of which damages in equity should be accounted for and allowed to the complainant herein. Also that said complainant has paid for taxes, and the redemption of said lands from tax-sales, the sum of five hundred and fifty-eight dollars and fifty-eight cents, and that the interest thereon from the time of such payment amounts to the sum of ninety-nine $\frac{57}{100}$ dollars, besides and above the sum paid by said Thomas R. Colledge, and by this decree allowed to him as proper to be tacked to his said mortgage, and which should also be allowed to said complainant, being and amounting in all to the sum of ($5,131.18) five thousand one hundred and thirty-one dollars and eighteen cents which ought to be credited and allowed to complainant as payment for the purchase-money herein. That the whole amount of the mortgage indebtedness to said Colledge, amounting to the sum of six thousand and fifty dollars and twenty-five cents, including interest to date as hereinbefore stated, should be allowed to said complainant as part payment of said consideration-money and interest upon the payment of the residue of said mortgage-debt due said Colledge as herein decreed, making the entire sum to be credited and allowed to said complainant, and which he should in equity be allowed upon his said contract herein decreed to be specially performed, eleven thousand one hundred and eighty-one dollars and forty-three cents, which, together with the sum of seven thousand dollars, the agreed price of the said lots in the village of Flatbush, and said lands in Sullivan and Essex Counties, New York, makes the sum of eighteen thousand one hundred and sixty-one $\frac{43}{100}$ dollars, and being the sum of four thousand two hundred and forty dollars and $\frac{58}{100}$ in excess, and over and above the amount now due upon and by the terms of said contract.

And the said court further doth find that said complainant ought not in equity and good conscience be required to convey to the said Theodore Shillabar said lots in Flatbush, and lands in said Sullivan and Essex Counties, New York, without some security or lien upon the same for the repayment to him of the aforesaid surplus and balance so found to be due him for the said payment of said mortgage to said Colledge, and other claims, allowances, and damages hereby allowed to him, being the aforesaid sum of four thousand two hundred and forty-nine dollars and fifty-eight cents, and that the same ought to be paid to him within a reasonable time or he be permitted to enforce the payment of the same from and out of the said lots in Flatbush, and said lands in Sullivan and Essex Counties, New York, and same be sold for that purpose. It is therefore ordered and decreed by the court that the said defendant, Ophelia A. Brooks, within ninety days from this date, make, execute, and deliver to said complainant a good and sufficient deed and conveyance in the law to all that portion of said premises called Buena Vista or Belleview, which lie in the county of Ogle and State of Illinois, being the same conveyed by said John Shillaber to said Joseph B. Brooks, which said deed shall be a conveyance of all the right, title, and interest which said Ophelia has acquired at law by virtue of said conveyance, either as widow of the said Joseph B. Brooks or as heir at law of John Holmes Brooks, deceased son of said Joseph B. Brooks and said Ophelia A., and that, in default thereof, J. Hort Burton, of Dixon, in said county of Lee, be, and he is hereby, appointed a commissioner to execute and deliver said deed and conveyance for and on part of said Ophelia A., and according to the terms of this decree. It is further ordered and decreed

that the said J. Hort Burton be, and he is hereby, appointed a commissioner, to make, execute, and deliver to said complainant a good and sufficient conveyance in law of all the rights, title, and interest which has or may be vested in Henry J. Brooks and Margaret P. Brooks, minors, under eighteen years of age, and children and heirs at law of said
103 Joseph B. Brooks, deceased, under and by virtue of said voluntary deed of conveyance, made by said John Shillaber in his lifetime to said Joseph B. Brooks, to said portion of said lands called Buena Vista, or Belleview, lying in said Ogle County, Illinois, and that said commission' make said deed, and have the same ready for delivery within ninety days from this date.

It is further order' and decreed that said Thoms R. Colledge make and execute to the complainant a good and sufficient deed of conveyance and release of all his right, title, and interest in said property and premises called La Grange, and conveyed to him by deed from said John Shillaber, and which said deed was by the interlocutory decree of said Ogle County circuit court declared to be a mortgage, which said conveyance shall describe said premises by their proper and legal description, according to the United States surveys thereof, and
104 shall be so executed and ready to be delivered to complainant within ninety days from this date. It is further ordered and decreed, that before said Colledge shall be required to deliver his said deed and release of said mortgage, the said complainant shall pay to the said Thomas R. Colledge, or to the clerk of this court, for the use of the said Colledge, in good current money of the United States, the sum of thirty-four hundred and seventy-two and $\frac{26}{100}$ dollars and interest from this date so found to be due to said Colledge on his said mortgage, and which payment shall be so made within ninety days from this date. And it is further ordered and decreed that if said money shall be so paid to said Colledge or to said clerk for his use, and said Colledge shall not thereupon deliver to said complainant said deed of conveyance and release, said H. A. Burton be, and he is hereby, appointed as special commissioner to execute said deed and release for and on the part of said
105 Colledge, and upon said complainant complying with all the terms of this decree and producing to said J. Hort Burton the receipt of the said Colledge, or of the clerk of this court, that said monies have been so paid or deposited, it is hereby made the further duty of said Burton, and he is hereby fully authorized and empowered, for and in the name and on the part and behalf of said Colledge, to make, execute, and deliver to said complainant a good, full, and complete conveyance and release of all said Colledge's interest in said premises called La Grange.

It is further ordered and decreed that the said complainant make, execute, and deposit with the clerk of this court a good and sufficient conveyance in the law to said three sections or lots of land, situated on Clarkson street, in the town of Flatbush, Kings County, New York, and also to said tract of four hundred and twenty acres of land situ-
106 ated in the town of Fallsburg, in Sullivan County, New York, and also to said tract of seventy-four acres of land situate in the town of Minerva, Essex County, New York, which deed shall be for the express consideration of three thousand dollars for said lots in Flatbush, and for the expressed consideration of four thousand dollars for said lands in Sullivan and Essex Counties, and shall contain full covenants of warrantee of title, and that the same are free from all incumbrances, and which deed shall be duly acknowledged according to the laws of the State of New York, and shall be so deposited with said clerk as an

escrow, and within ninety days from this date, and shall run to Theodore Shillaber, heir at law of John Shillaber, deceased.

It is further ordered and decreed that said Theodore Shillaber and Silas Noble, or one of them, pay or cause to be paid, within the said term of ninety days from this date, to said complainant, or to said clerk of this court, for his fees, the said sum of four thousand two
107 hundred and forty-nine and $\frac{50}{100}$ dollars, and interest from this date, being the amount of money so found due said complainant for his said damages, allowances, and monies paid to redeem said La Grange.

It is further ordered and decreed that, if said complainant shall within the time aforesaid pay or deposit, as herein directed, his said deeds and monies, to wit, the said money due said Colledge, and said deeds to said Theodore, according to the true intent and meaning of this decree, then it shall be the duty of said defendants Colledge and Ophelia A. Brooks, and the said Burton for said Henry J. and Margaret P. Brooks, or the said Burton, as the further commission of this court appointed for that purpose, for and on the part said Ophelia A. and Thomas R., to deliver to said complainant the aforesaid deeds, duly acknowledged. And the said Theodore Shillaber shall also, within the said ninety days, on complainant's complying with the terms of this
108 decree, execute and deliver to the complainant a release of all rights and equity of redemption in and to any and all of said premises, and on his failure to do so this decree shall be taken as a lien to all his right, title, and interest in said premises, or any part thereof, as heir at law of said John Shillaber, or which is or may be in any wise held or claimed by the said Theodore, or any person or persons claiming under him, and he is hereby, upon the carrying into effect of this decree on the part of said complainant, decreed to be barred and foreclosed of all right, title, and equity of redemption herein: So the said J. Hart Burton is hereby further made a commissioner to make, execute, and deliver, for and on the part of said Theodore, on his failing or refusing to make the same, any and all deeds, conveyances, and releases that may be necessary to vest in said complainant a good and perfect legal title to all and singular the premises herein decreed to him.

109 It is further hereby ordered and decreed by the court that, if the said Silas Noble and Theodore Shillaber shall fail or neglect to pay to said complainant, or to said clerk of this court for his use, within said time of ninety days, the said sum of forty-two hundred and forty-nine and $\frac{50}{100}$ dollars, and interest from this date, then the said clerk shall deliver up to said complainant said deed made by him to said Theodore Shillaber to said Flatbush lots, and to said lands in Sullivan and Essex Counties, New York, and the said complainant thereupon, and at the same time, execute and deliver to said Silas Noble a trust-deed to said lots and lands in New York in time that the said Silas Noble shall proceed to sell the same, in such manner, and after giving such reasonable notice of the time and place of such sale as may be usual or provided by law in the State of New York, and shall make, execute, *and deliver to said Silas Noble a trust-deed to said lots and*
110 *lands in New York in time that the said Silas Noble shall proceed to sell the same, in such manner, and after giving such reasonable notice of the time and place of such sale, as may be usual or provided by law in the State of New York, and shall make, execute,* and deliver to the purchaser or purchasers thereof good and sufficient legal titles for the same, and out of the proceeds pay, first, the expenses of such trust recovered the said sum of money so due to said complainant, and interest from this

date, and hold the balance subject to the further orders of this court, either to be paid to the said Theodore or be applied to said Noble in the payment of the debts of the estate of said John Shillaber, allowed against the said estate, and to be paid by said Noble as administrator of said estate out of assets in his hands, to be administered as this court shall further direct.

And it is further hereby ordered *ordered* and directed that, if
111 the said Silas Noble and Theodore Shillaber, or either of them, shall pay the said complainant, or to said clerk of this court for his use, the said sum of forty-two hundred and forty-nine dollars and fifty-eight cents, and interest, within the time in this decree limited, then said deed, made by said complainant to said Theodore to said property in New York, shall be delivered to said , or his authorized agent, and shall vest in him a good and perfect title to said property therein described; and, finally, it is ordered and decreed that said defendants Theodore Shillaber and Silas Noble, as administrators, and Thomas R. Colledge, pay the costs herein.

September 20th, 1860.

J. H. HOWE,
Judge 6th Circuit, Illinois.

112 STATE OF ILLINOIS,
Rock Island County, ss:

I, Edward H. Bowman, clerk of the circuit court in and for said county, hereby certify that the foregoing writing is a correct and full copy of the two decrees now of record in my office in the city of Rock Island, county and State aforesaid, in the cause of John Robinson vs. Theodore Shillaber et al.

Witness my hand seal of said court this 20th day of April, A. D. 1864.

EDWARD H. BOWMAN, *Clk.*,
Pr. ROBERT THOMPSON, *Dy. Clk.*

(Endorsed:) U. S. circuit court, eastern dist. of New York. Theodore Shillaber agst. John Robinson. Copy of final decree of the court of chancery, State of Illinois. Filed May 24th, 1873.

113 Article of agreement made this twelfth day of October, in the year one thousand eight hundred and fifty-two, by and between John Shillaber, of Ogle County, Illinois, and John Robinson, of the town of *of* Flatbush, in the county of Kings, and State of New York.

Firstly. The party of the first part agrees to sell, and the party of second part agrees to purchase of him, the following real estate and other property, that is to say, about three thousand acres of land, situate in Lee and Ogle Counties, in the State of Illinois, about one thousand and five hundred acres of which is called Le Grand's farm, and the remainder of which has been designated by the party of the first part by the name of Buonavista, also about on' thousand acres of land, called the Bluff, situate in Lee County, in the State of Illinois, and bounded on the north by the Rock River, the said lands to be conveyed with all buildings and improvements thereon as they are now situated, also all the farm stock, cattle, horses, sheep, swine, farming utensils, machines and tools, and stock and materials of all kinds, now on the said lands above described, and every part thereof.

Secondly. The price of all the said lands with their improvements is six dollars and seventy-five cents per acre, amounting in all to

the sum of twenty-seven thousand dollars. The price of the other property above specified is its fair value, to be agreed upon by the parties, or if they cannot agree, by disinterested appraisers, one to be chosen by each party, and the third by the other two, whose award and appraisement made on due notice to both parties shall be conclusive.

Thirdly. The party of the second part is to pay for the said land and other property at the times and in the manner following:

He is to pay eight thousand dollars in lawful money of the United States upon the execution and delivery of the deeds of the real estate above described and the transfer and delivery of possession thereof, and of the above-mentioned personal property, to him. He is to pay three thousand dollars, part of said purchase-money, by the sale and conveyance to the party of the first part of three sections or lots of land situate in Flatbush, Kings County, New York, situate upon Clarkson street, and now owned by the party of the second part. He is to pay the sum of four thousand dollars, part of such purchase-money, by the conveyance and sale of about four hundred and twenty acres of land situate in the town of Fallsburgh, in Sullivan County, New York, near Sandburgh Post-Office, now owned by the party of the second part, and about seventy-four acres of land situate in the town of Minerva, Essex County, New York, also owned by the party of the second part, and he is to secure the payment of the balance, payable at the end of five years, with six per cent. interest, payable semi-annually, by his personal bond, and a second mortgage upon the farm and premises in the town of Flatbush, Kings County, New York, where the party of the second part now resides, and which contains twenty-six acres, more or less.

Fourth. The deeds of conveyance of the property purchased by the party of the second part, and also of the lands to be conveyed in payment as above, shall be executed as soon as may be with all reasonable dispatch, allowing the necessary time for the examination of the title and to enable the party of the second part and his wife to visit in person the property in Illinois. And all such deeds shall be properly executed and shall be good and sufficient to convey a good and indefeasible title in fee-simple to the respective parties, and shall be executed by all necessary parties, and shall contain all the usual covenants in use in the State of New York.

Fifthly. All the lands to be conveyed by either party to the other shall be free and discharged from all liens and incumbrances and charges of every kind, and from all taxes and assessments of every description.

Sixthly. The farm and premises in Flatbush, Kings County, upon which the second mortgage is to be given for securing the payment of the balance of the purchase-money as aforesaid, shall be at the time when such second mortgage shall be executed, and shall at all times be kept by the party of the second part free from all previous liens and incumbrances, excepting that the party of the second part may encumber the same by a prior mortgage or mortgages now on said premises, or to be hereafter executed, to the amount of twenty thousand dollars of principal, he keeping the interest on such prior mortgage or mortgages paid from time to time, when it falls due.

Seventhly. The party of the first part shall transfer to the party of the second part, upon his request, all policies of insurance which are now in force upon the buildings on the said real estate in Illinois, or any part thereof.

Eighthly. In case, upon actually visiting and viewing the said real estate situate in the State of Illinois, the wife of the party of the second part shall perceive objections to exist to the said property or its
117 situation or location, so that she cannot be content and reconcile herself to the idea of making the same the future residence of herself and her family, the party of the second part shall give notice, in writting, to the party of the first part, and thereupon these presents shall be void and of no effect.

Ninthly. The party of the second part warrants the said lands in Sullivan County and Essex County, New York, to contain—the lands in Sullivan County, four hundred and twenty acres, and the lands in Essex County, seventy-four acres; and if, upon actual survey, they should be deficient in that amount, he will make good such defficiency.

In witness whereof the parties have hereunto set their hands and seals the day and year first above written.

JOHN SHILLABER.
JOHN ROBINSON.

In presence of—
DAN. MARVIN.

(Endorsed:) Shillaber vs. Robinson. Contract.

118 U. S. circuit court, eastern district of New York.

THEODORE SHILLABER
vs.
JOHN ROBINSON.

It is hereby stipulated that the copies of the two decrees of the court of chancery of the State of Illinois, which are referred to in the pleadings in this suit, which copies are in the possession of the solicitor for the complainant herein, and are certified to be true copies of the said decrees by Edward H. Bowman, the clerk of the circuit court in and for the county of Rock Island, in said State of Illinois, by certificate dated 20th day of April, 1864, under the seal of said court, be read in evidence by either party on the hearing of this suit without further authentication.

Brooklyn, Feb'y 28th, 1873.

PHILIP S. CROOKE,
Solr. for Deft.
COLES MORRIS,
Solr. for Complt.

(Endorsed:) Stipulation.

119 This indenture, made the sixth day of December, in the year one thousand eight hundred and sixty, between John Robinson, of Flatbush, in the county of Kings, in the State of New York, and Samuella B., his wife, parties of the first part, and Silas Noble, of , in the State of Illinois, parties of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of seven thousand dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said party of the second part, his successor and assigns for-

ever, all those three sections or lots situate in Clarkson street, in said town of Flatbush, in the county of Kings and State of New York, owned by said John Robinson, party hereto of the first part, and which are numbered thirteen, (13,) fourteen, (14,) fifteen, (15,) on a map of forty-five plots of land, on the same street, the said three lots of land being each seventy-five (75) feet in width, front and rear, and about two-
120 hundred and forty-seven (247) feet in depth; also all that certain tract of land of four hundred and twenty acres of laid owned by said John Robinson and situate in the town of Fallsburgh, in the county of Sullivan and State of New York, be the same more or less, the said tract being part of lot four, in great lot number one, in Hardenburgh's patent, made May, 1847, by J. O. Dunning, surveyor, and also all that certain tract of land, owned by said John Robinson, of seventy-four (74) acres of land, situate, lying, and being in the town of Minerva, in the county Essex and State of New York, the premises hereby conveyed and intended to be conveyed being the same premises which are referred to in a certain decree made by the circuit court within and for the county of Rock Island, in the State of Illinois, in chancery, on the twentieth day of September, A. D. 1860, as by reference thereto will more fully and at large appear, this deed being executed in obedience to and conformity with said decree, and to carry out the requirements and provisions thereof, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, and
121 interest, dower and right of dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, and to the same, and every part and parcel thereof, with the appurtenances thereunto belonging or in any wise appertaining. To have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, his successors and assigns, upon the especial trust and confidence that he, the said party of the second part, shall proceed to sell and convey, in fee-simple, all and singular the above-described lots, pieces, parcels, and tracts of land in such manner, and after giving such notice of the time and place of such sale, as may be usual or provided by law in the State of New York, and that he, the said part' of the second part, shall make, execute, and deliver to the purchaser or purchasers thereof good and sufficient legal titles for the same and every part thereof; and out of the proceeds arising therefrom shall pay, first, the expences attendant upon the execution of this trust; second, after the payment of said expences, the party of the second part shall pay to the party of the first part, viz, to the said John Robinson or his legal representa-
tives, out of the residue of the moneys arising from the proceeds of
122 such sales, of said lands, the said sum of four thousand two hundred and forty-nine dollars and fifty-eight cents, with interest thereon from the twentieth day of September, one thousand eight hundred and sixty, or so much thereof as may be due, and if any balance shall then be and remain unappropriated, he, the party of the second party, shall hold the same subject to the further order of the circuit court in and for Rock Island County, in the State of Illinois, either to be paid to the said Theodore Shillaber described in said decree, or to be applied by the said Silas Noble in the payment of the debts of the estate of John Shillaber, deceased, allowed against the said estate, and to be paid by said Silas Noble as administrator thereof of said estate out of assets in his hands

to be administered as the said circuit court in and for said county of Rock Island shall direct.

And the said John Robinson, for himself and his heirs, executors, and administrators, doth covenant, grant, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the delivery hereof the said party of the first part was the lawful owner of the premises above granted, and was seized thereof in fee-simple absolute, and that he will warrant and defend the above-granted prem-
123 ises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, forever.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

JOHN ROBINSON. [L. S.]
SAMUELLA B. ROBINSON. [L. S.]

Sealed and delivered in the presence of—
JOSEPH G. WILSON.
CHAS. A. JOURDAN.

STATE OF NEW YORK,
County of Kings, ss:

On this seventh day of December, in the year of our Lord one thousand eight hundred and sixty, before me personally came John Robinson and Samuella B. Robinson, his wife, to me known to be the individuals described in and who executed the within deed, who severally acknowledged that they executed the same for the purpose therein mentioned; and Samuella B. Robinson, the wife of said John Robinson, on a private examination apart from her husband, acknowledged to me that she executed said deed freely, and without any fear or compulsion of her said husband.

JOSEPH G. WILSON,
Commissioner of Deeds.

(Endorsed:) John Robinson & wife to Silas Noble. Trust-deed.

124 This indenture, made the sixth day of December, in the year of our Lord one thousand eight hundred and sixty, between John Robinson, of the town of Flatbush, in the county of Kings and State of New York, and Samuella B., his wife, party of the first part, and Theodore Shillaber, heir at law of John Shillaber, of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of three thousand dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledge', and the said party of the second part, his heirs, executors, and administrators, forever released and discharged from the same, by these presents have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said party of the second part, and to his heirs and assigns, forever, all those three sections or lots of land situate, lying, and being in the town of Flatbush, in the county of Kings, in the State of New York, and situ-
125 ate on Clarkson street, now owned by said John Robinson, and known by the numbers thirteen, (13,) fourteen, (14,) fifteen, (15,) on a map of forty-five plots of land on said street, the said three lots being each seventy-five (75) feet in width, front and rear, and about two hundred and forty-seven feet in depth; together with all and

singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, dower, and right of dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said part' of the first part of, in, and to the same, and every part and parcel thereof, with the appurtenances; to have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof forever. And the said John Robinson, for himself, his heirs, executors, and administrators, doth covenant, grant, and agree to and with the said party
126 of the second part, his heirs and assigns, that the said John Robinson at the time of the sealing and delivery of these presents is lawfully seized in his own right of a good, absolute, and indefeasible estate of inheritance in fee-simple of and in all and singular the above granted, bargained, and described premises, with the appurtenances, and hath good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid; and that the said party of the second part, his heirs and assigns, shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess, and enjoy the above-granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the said parties of the first part, their heirs or assigns, or of any other person or persons lawfully claiming or to claim the same; and that the same now are free, clear, discharged, and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, and encumbrances of what nature or kind soever; and also that the said parties of the first part, and their heirs, and all and every
127 other person or persons whatsoever lawfully or equitably deriving any estate, right, title, or interest of, in, or to the hereinbefore granted premises by, from, under, or in trust for him or them, shall and will, at any time or times hereafter, upon the reasonable request and at the proper costs and charges in the law of the said party of the second part, his heirs and assigns, make, do, and execute, or cause or procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, conveyances, and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said party of the second part, his heirs and assigns, forever, as by the said party of the second part, his heirs or assigns, or his or their counsel learned in the law, shall be reasonably devised, advised, or required.

And the said parties of the first part, their heirs, the above-described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said parties of the first part and their heirs, and against all and every person and persons whomsoever lawfully claiming or to claim the same, shall and will warrant,
128 and by these presents forever defend.

In witness whereof the said parties of the first part have hereunto set hands and seals the day and year first above wrtiten.

JOHN ROBINSON. [L. S.]
SAMUELLA B. ROBINSON. [L. S.]

Sealed and delivered in the presence of—
JOSEPH G. WILSON.
CHARLES A. JOURDAN.

STATE OF NEW YORK,
County of Kings, ss:

On this seventh day of December, in the year of our Lord one thousand eight hundred and sixty, before me personally came John Robinson and Samuella B. Robinson, his wife, to me known to be the individual described in and who executed the within conveyance, who severally acknowledged that they executed the same for the purposes therein mentioned; and Samuella B. Robinson, the wife of said John Robinson, on a private examination apart from her husband, acknowledged to me that she executed such conveyance freely, and without any fear or compulsion of her said husband.

JOSEPH G. WILSON,
Commissioner of Deeds.

STATE OF ILLINOIS,
Rock Island County, ss:

I, Edward H. Bowman, clerk of the circuit court in and for said
129 county, do hereby certify that the within deed was this day delivered to me and deposited in my office as an 'scrow by Dr. John Robinson, of Brooklyn, New York, pursuant to and in compliance with the terms of a certain decree in chancery made and entered by the said circuit court in and for the county of Rock Island aforesaid, on the twentieth day of September, A. D. 1860, in a certain cause wherein said Dr. John Robinson is complainant and Thomas R. College, Theodore Shillaber, Silas Noble, admr. of John Shillaber, dec'd, and others are defendants, and to be delivered by me to the said defendant, Theodore Shillaber, upon the payment to said complainant, or to me for his use, within ninety days from the date of said decree, of the sum of four thousand two hundred and forty-nine $\frac{53}{100}$ dollars, and interest from the date of said decree; and, in default of such payment within said term of ninety days from the said date of said decree, this deed to be by me delivered up to said complainant as required by said decree.

Witness my hand & the seal of said court this 19th day of December, A. D. 1860.

E. H. BOWMAN, *Clerk.*

STATE OF ILLINOIS,
Rock Island County, ss:

130 DECEMBER 20TH, 1860.—The within-named Theodore Shillaber having failed and neglected to appear at my office of clerk, &c., as aforesaid, or any one for him or in his behalf, to make the payment required by the decree above referred to in my certificate of yesterday, and having wholly neglected and failed to make the payments required of him by said decree, and upon the making of which payments the delivery to him of this deed was by the said decree conditioned, I have now at this date redelivered this deed to said complainant, John Robinson, he having at the same time executed to Silas Noble the trust-deed mentioned and required by the decree aforesaid.

Witness my hand and the seal of said court this 20th day of December, A. D. 1860.

E. H. BOWMAN, *Clerk.*

(Endorsed:) John Robinson and wife to Theodore Shillaber. Dated Dec. 6th, 1860. Deed.

131 *Trustee's deed.*

This indenture, made the sixteenth day of March, in the year one thousand eight hundred and sixty-one, between Silas Noble, of Dixon, in the county of Lee, in the State of Illinois, trustee, under and by virtue of a certain deed of trust, bearing date the sixth day of December, 1860, executed by John Robinson and Samuella B., his wife, of Flatbush, in the county of Kings, and State of New York, to the said Silas Noble, party of the first part, and John A. Robinson, of Flatbush, aforesaid, party of the second part:

Now this indenture witnesseth, that the said party of the first part, for and in consideration of the sum of fifteen hundred dollars, lawful money of the United States of America, to him in hand paid at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey, and confirm unto the said party of the second part all those three sections or lots situate in Clarkson street, in said town of Flatbush, in the county of Kings, and State of New York, heretofore owned by John Robinson, and which are numbered thirteen, (13,) fourteen, (14,) fifteen, (15,) on a map of forty-five plots of land on the same street, the said three lots of lands being each seventy-five (75) feet in width, front and rear, and about two hundred and forty-seven (247) feet in depth, being a part of the premises conveyed to the said

132 Noble in and by the said trust-deed, together with all and singular the tenements, hereditaments, and appurtenances unto the same belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, under or by virtue of the said trust-deed or otherwise, of, in, and to the same, and every part and parcel thereof; to have and to hold the above mentioned and described premises, hereby granted and conveyed, or intended so to be, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their only proper use, benefit, and behoof forever. And the said part' of the first part does hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the said party of the second part, that the said party of the first part has not at any time made, done, committed, or caused any act, matter or thing whatsoever whereby or by means whereof the said premises hereby granted and released as aforesaid, or any part thereof, are or can in anywise be impeached or encumbered in title, charge, estate, or otherwise. And also that, the said party of the second part, his heirs and assigns, shall and may, at all times hereafter, peaceably and quietly have, hold, use, occupy, possess, and enjoy the above granted, bargained, and described premises, and every part and parcel thereof, with the appurtenances, and receive and take the rents, issues, and profits thereof, to and for his and their proper use and benefit, without any let, suit, hindrance, molestation, eviction, or denial, of, from, or by the said party of the first part, his heirs or assigns, or of, from, or by any other person or persons whomsoever lawfully claiming or to claim any estate, right, title, or interest of, in, or to the same, by, from, or under them, or either of them.

In witness whereof the parties to these presents have hereunto inter-

changeably set their hands and seals the day and year first above written.

SILAS NOBLE, [L. S.]
Trustee.

Sealed and delivered in the presence of—
FREDERICK BULL.

CITY AND COUNTY OF NEW YORK, *ss:*

One the eighteenth day of March, one thousand eight hundred and sixty-one, before me personally appeared Silas Noble, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that he executed the same.

FREDERICK BULL,
Com'r of Deeds.

133 (Indorsed:) Silas Noble, trustee, to John Robinson. Trustee's deed. Dated March 16th, 1861. F. F. Marbury, atty. and counsellor, 64 Wall st.

134 *Trustee's deed.*

This indenture, made the 16th day of March, in the year one thousand eight hundred and sixty-one, between Silas Noble, of Dixon, in the county of Lee, in the State of Illinois, trustee, under and by virtue of a certain deed of trust, bearing date of sixth day of December, 1860, executed by John Robinson and Samuella B., his wife, of Flatbush, in the county of Kings, and State of New York, to the said Silas Noble, party of the first part, and John A. Robinson, of Flatbush, 'foresaid party of the second part:

Now this indenture witnesseth that the said party of the first part, for and in consideration of the sum of four hundred and ninety-four dollars, lawful money of the United States of America, to him in hand paid at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey, and confirm, unto the said party of the second part, all that certain tract of land, of four hundred and twenty acres of land, heretofore owned by John Robinson, and situate in the town of Fallsburgh, in the county of Sullivan, and State of New York, be the same more or less, the said tract being part of lot four, in great lot number one, in Hardenburgh's patent, made May, 1847, by J. O. Dunning, surveyor; and also that certain tract of land, heretofore owned by said John Robinson, of seventy-four (74) acres of land, situate, lying, and being in the town of *of* Minerva, in the county of Essex,
and State of New York, being a part of the premises conveyed
135 to the said Noble in and by the said trust-deed, together with all and singular the tenements, hereditaments, and appurtenances unto the same belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, under or by virtue of the said trust-deed, or otherwise, of, in, and to the same, and every part and parcel thereof; to have and to hold the above mentioned and described premises, hereby granted and conveyed, or intended so to be, with the appurtenances, unto the said

party of the second part, his heirs and assigns, to his and their only proper use, benefit, and behoof forever. And the said party of the first part does hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said party of the second part that the said party of the first part has not at any time made, done, committed, or caused any act, matter, or thing whatsoever whereby or by means whereof the said premises hereby granted and released as aforesaid, or any part thereof, are or can in any wise be impeached or encumbered in title, charge, estate, or otherwise. And also that the said party of the second part, his heirs and assigns, shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess, and enjoy the above granted, bargained, and described premises, and every part and parcel thereof, with the appurtenances, and receive and take the rents, issues, and profits thereof, to and for his and their own proper use and benefit, without any let, suit, hindrance, molestation, eviction, or denial of, from, or by the said party of the first part, his heirs or assigns, or of, from, or by any other person or persons whomsoever lawfully claiming or to claim any estate, right, title, or interest of, in, or to the same by, from, or under them, or either of them.

In witness whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

SILAS NOBLE, [L. S.]
Trustee.

Sealed and delivered in the presence of—
FREDERICK BULL.

CITY AND COUNTY OF NEW YORK, *ss:*

On the eighteenth day of March, one thousand eight hundred and sixty-one, before me personally appeared Silas Noble, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that he executed the same.

FREDERICK BALL,
Com'r of Deeds.

136 (Indorsed:) Silas Noble, trustee, to John A. Robinson. Trustee's deed. Dated March 16th, 1861. F. F. Marbury, atty. & counsellor, 64 Wall st., N. Y.

137 United States circuit court, eastern district of New York.

THEODORE SHILLABER } *agst.* JOHN ROBINSON. }

It is hereby stipulated that the defendant may read in evidence on the trial or argument of this case the deed from John Robinson to Silas Noble, trustee, trust deed; also, the deed or deeds of Silas Noble, trustee, to John A. Robinson, mentioned in the answer also. It is admitted that the notice of sale, a copy of which is annexed to the answer herein, was published once a week, for six weeks successively, in the Brooklyn Standard, a newspaper printed and published in the city of Brooklyn, and that such publication took place immediately previous to the day of sale mentioned in such notice.

COLES MORRIS,
Solr. for Complts.
PHILIP S. CROOKE,
Solr. for Deft.

(Endorsed:) Stipulation as to evidence.

138 United States circuit court, eastern district of New York.

THEODORE SHILLABER }
vs. } In equity.
JOHN ROBINSON. }

MAY 24TH, 1873.—Present, Hon. Ward Hunt, associate judge.
Hearing on pleadings and proofs.
Cause called. Both sides ready.
Coles Morris opens for plaintiff.
John H. Bergen replies for defendant.
Cause submitted.

139 U. S. circuit court, eastern district of New York.

THEODORE SHILLABER }
vs. }
JOHN ROBINSON. }

JULY 2ND, 1873.

HUNT, *Justice*:

By the decree of the court of Illinois, of September term, 1860, in the suit wherein John Robinson was the plaintiff, and Theodore Shillaber and others were the defendants, it was adjudged that after making the proper statement of the accounts there due to the plaintiff from the defendant at that date, upon the contract for the sale and exchanging lands, the sum of $6,031.85, on the La Grange and Buena Vista lands, there was due to Colledge, on mortgage of a portion of the lands, $3,472.26. This sum the complainant was directed to pay to Colledge, who was required thereupon to execute to the complainant a deed of release of the premises covered by his deed from Shillaber, which was adjudged to be a mortgage only. In default of his executing the
140 deed, the clerk was authorized to execute in his name.

By the contract the complainant in that suit was bound to convey to the defendant certain lands in Flatbush, Kings Co., and certain lands in Sullivan County, at an agreed price of $7,000.00, but it was adjudged that he ought not to convey them without retaining a security or lien upon them for the surplus and balance found due to him of $4,249.58, and that unless that sum was paid to him within a reasonable time, he should be permitted to enforce the same by a sale of the Flatbush and Sullivan County lots.

The money found due to Colledge was directed to be deposited with the clerk within 90 days from date of the decree, and Mr. Barton was appointed a commissioner with authority to execute to the complainant the necessary deeds of the Illinois lands.

The decree directed the complainant to make and acknowledge deeds to Shillaber of all the New York lands and deposit the same with the clerk within 90 days as an escrow that if so deposited and the
141 money so directed to be paid for Colledge was paid to the clerk, then the commissioner was to deliver to the complainant the deeds conveying the Illinois lands.

The sum of $4,249.50 was adjudged to be payable by Shillaber to complainant, and it was adjudged that if Shillaber failed to pay the same to the clerk of the court within ninety days from the date of the decree, the clerk should deliver up to the complainant the deed made by him to Shillaber of the New York lands, and complainant should exe-

cute a trust-deed of the same to Noble in trust to sell the same in such manner and upon such reasonable notice "as may be usual or provided by law in the State of New York."

If the $4,298.58 should be paid to the clerk for complainant within the time required, then the deed of the New York lands was to be delivered to him by the clerk.

The money was not paid by the clerk to Shillaber; the deed delivered to him by the complainant was given back to him, and he execute'
142 a trust-deed to Noble in compliance with the direction of the decree.

In 1861 a notice of the sale of the lands was published once in each week for six weeks in the Brooklyn Standard, and on the day appointed the lands were sold at public auction by said Noble to John A. Robinson for $1,950, the said John A. purchasing for the defendant, John Robinson. No money was paid, nor were the deeds recorded from Robinson to Noble and from Noble to John A., and Robinson has since sold various portions of the land to bona-fide purchasers for large sums of money. The complainant insists that Robinson must account as his trustee for all the monies received by him on the sale of the New York lands.

The complainant contends that under the proceedings in the Illinois suit Robinson held and occupied the New York lands as a mortgagee in possession; that the mortgage has never been foreclosed as to him, and that they must be an account taken of the sales or of the value of the land, and that after satisfying the amount due on the mortgage, the remaining interest or value must be paid to him. If the first
143 proposition is correct the second follows as its consequence, as the proceedings taken by Noble in 1861 cannot be held to amount to a foreclosure of a mortgage.

The title of the New York lands in form remained in Robinson. Shillaber, however, in the account rendered was charged with their value, and thus in the settlement of the accounts paid for them in full.

The sole question arises upon the effect of the trust-deed to Noble.

I do not discover any principal upon which it can be treated as a mortgage. Robinson conveyed absolutely to Noble, but for a specific purpose. Noble held the lands for that purpose, to wit, in trust, to sell them, and make payment to Robinson of the amount due to him. In equity the title of the fee may be conceded to have been in Shillaber when he became charged with their contract-price in the settlement of the contract. This, however, does not determine the point. Suppose the lands had been conveyed to Shillaber in form upon this set-
144 tlement, and that he had then conveyed them to Noble upon the trust contained in the present deed to Noble. I do not see, however, under that circumstance he could claim the rights of an equitable mortgage.

Lands conveyed in trust for purposes recognized by law pass absolutely to the grantee. He holds the legal title, and if the terms of the trust are performed, not only does the legal title pass to a grantee, but the equities of the original owner are at an end.

No stronger equity can be assumed for the plaintiff than if he had held the title and made the conveyance to Noble, instead of its being made by Robinson.

Noble was authorized to sell upon such reasonable notice as may be usual or provided by law in the State of New York. The notice given was in compliance with this provision, and cut off all claims of the present plaintiff.

The bill should be dismissed with costs.

145 At a stated term of the circuit court of the United States for the second circuit and eastern district of New York, held at the court-house in the city of Brooklyn, on the 15th day of October, A. D. 1873.

Present, Hon. Ward Hunt, justice.

THEODORE SHILLABER } In equity.
vs.
JOHN ROBINSON. }

This cause having been heretofore heard on argument by Coles Morris, esq., of counsel for complainant, and by John H. Bergen, of counsel for defendant, on the pleadings and proofs, and the court having considered the same, and having had due deliberation thereon, and being of the opinion that the complainant's bill of complaint in the above suit should be dismissed with costs—

Now, on motion of Philip S. Crooke, solicitor for defendant, it is ordered, adjudged, and decreed, and this court, by virtue of the

146 power and authority therein invested, doth hereby order, adjudge, and decree, that the said complainant's bill of complaint in the action be, and the same is hereby, dismissed with costs.

And it is further ordered, adjudged, and decreed that the complainant pay to the said defendant or his counsel his costs of suit, which has been taxed at sixty-two $\frac{90}{100}$ dollars, and that said defendant have execution against said complainant for such costs.

Allowed by—

WARD HUNT,
Asso. Just. Sup. Ct. U. S.

(Indorsed:) U. S. circuit court, E. dist. of New York. Theodore Shillaber vs. John Robinson. Decree dismissing complainant's bill of complaint. Philip S. Crooke, sol'r for deft. Filed October 15th, 1873.

147 U. S. circuit court, eastern district of New York, in equity.

THEODORE SHILLABER, COMPLAINANT, }
vs.
JOHN ROBINSON, DEFENDANT. }

To the honorable the Supreme Court of the United States:

The appeal of Theodore Shillaber, the above-named complainant and appellant, respectfully shows: That upon the eighteenth day of November, 1870, the above-named complainant filed his bill in the circuit court of the United States for the eastern district of New York against the above-named defendant, of which said bill the following is an abstract:

Circuit court of the United States, eastern district of New York.

THEODORE SHILLABER, COMPLAINANT, }
vs.
JOHN ROBINSON, DEFENDANT. }

148 *Abstract of the bill of complaint.*

On the 12th Oct., 1852, John Shillaber, the father of the complainant,

made an agreement in writing with the defendant, whereby he agreed to sell to the defendant, who agreed to purchase the same, a tract of land in Lee and Ogle Counties, in the State of Illinois, containing about 3,000 acres, one-half of which was called the La Grange Farm, and the other half was called *Beuna* Vista; and also a tract of land containing about 1,000 acres, called the Bluff, and situate in Lee County, in said State.

The price to be paid for said lands was six dollars and seventy-five cents per acre, and payment therefor was to be made in the following manner:

The defendant was to convey to said Shillaber, in payment of $3,000, part of the purchase-money of said lands, three sections or lots of land situate upon Clarkson street, in the village Flatbush, in King's County, State of New York; and in payment of $4,000, part of such purchase-money, about 420 acres of land situate in the town of Fallsburgh, in Sullivan County, and about 74 acres of land situate in the town of Minerva, Essex County, in said State of New York, all which property was then owned by the defendant. The balance of the purchase-money was to be paid partly in cash and partly by a bond and mortgage upon the farm and premises in Kings County, State of New York, where the defendant then resided.

See bill, last line of folio 1 to 6th line of folio 7.

149 The said John Shillaber, for some reason which does not expressly appear, refused to perform this agreement, and a suit was commenced against him for a specific performance thereof by the said John Robinson, (the present defendant,) in the court of chancery of the State of Illinois, in the county of Ogle, in said State.

See bill; 8th line of folio 8 to end.

During the pendency of said suit, and before any hearing in the same was had, the said John Shillaber died, and a supplemental bill was afterwards filed in said suit, making parties thereto the complainant in this suit, who is the only heir at law of the said John Shillaber, and one Silas Noble, to whom letters of administration of the estate of said John Shillaber had been in due form of law granted by the county clerk of said Ogle County.

Bill, fo. 9.

In October, 1855, an interlocutory decree was made in said suit, by which it was adjudged that the said John Shillaber and this complainant, as his heir at law, had unreasonably refused to perform the said contract of sale, and that there ought to be a specific performance thereof; that the said Robinson should convey to this complainant the said lots and tracts of land in the State of New York, and that upon the execution and delivery of such conveyance and the payment of the residue of the purchase-price of the said lands in Illinois, this complainant should convey the same to the said Robinson.

Bill; between fo. 10 and fo. 28.

On 10th September, 1860, a final decree was made in said suit, at a circuit court sitting as a court of chancery, in and for the county

150 of Rockland, in said State of Illinois.

By this decree, which is still in full force and effect, it was adjudged that the said Theodore Shillaber could only make title to a portion of the Illinois lands described in said agreement, viz, to about 1,730 acres thereof, which amounted in value, at the contract-price of six dollars and seventy-five cents per acre, to the sum of $11,695.32; that from this sum should be deducted the sum of $7,000, for the price of the three lots in Clarkson street, in the village of Flatbush, Kings County, and of the lands in Sullivan and Essex Counties, State of New York, (which by the terms of said agreement were to have been conveyed by

Bill, fo. 11.

" fo. 13-15.

the said Robinson to the said John Shillaber,) leaving a balance of $4,695.32, which, with the sum of $2,236.53, for interest on such balance to the date of said decree, made a total balance of $6,931.85 due by the said Robinson for or on account of the purchase of the said $1,732\frac{64}{100}$ acres land.

It was further adjudged by said decree that the said Robinson was entitled to a credit on account of such purchase-money and interest of $6,050.25, the amount due to Thomas Colledge, (who was a party to said suit,) upon a mortgage to which the La Grange farm was subject, and of $5,131.18 on account of the rents and profits of said Illinois lands to the date of said decree, and for damages and other items in said decree enumerated, making the entire amount to be credited and allowed to said Robinson, and which he should in equity be allowed upon his said agreement, the sum of $11,181.43, and leaving the sum of $4,240.58 in excess an' over and above the aforesaid amount due by the said Robinson at the date of said decree upon and by the terms of said agreement.

Folio 15 of bill.

Folios 15, 16, 17, & 18 of bill.

151

Folio 19 of bill.

It was further adjudged by said decree that the said Robinson ought not in equity and good conscience to be required to convey to the said Theodore Shillaber said lots in Flatbush, and said lands in Sullivan and Essex Counties, in the State of New York, without some security or lien upon the same for the repayment to him of the aforesaid surplus of $4,249.58; and that the same ought to be paid to him within a reasonable time, or that he be permitted to enforce the payment of the same from and out of the said lots in Flatbush and lands in Sullivan and Essex Counties, in the State of New York, and have the same sold for that purpose; and it was thereupon further adjudged by said decree that the said Robinson should make, execute, and deposit with the clerk of said court good and sufficient conveyances in the law to said lots in Flatbush, and to said lands in Sullivan and Essex Counties, in the State of New York, which should be for the expressed consideration of three thousand dollars for said Flatbush lots, and of four thousand dollars for said lands in said counties of Sullivan and Essex, and should contain full covenants of warranty of title, and that the same were free from all encumbrances, and should be duly acknowledged according to the laws of the State of New York, and should be deposited with said clerk as an escrow within ninety days from the date of said decree, and should run to the said Theodore Shillaber, heir at law of John Shillaber, deceased; and that the said Theodore Shillaber and the said Silas Noble, or one of them, should pay or cause to be paid, within the said time of ninety days, to the clerk of said court, the said sum of $4,249.58, and interest thereon from the date of said decree; and that if the said Robinson should, within the time aforesaid, deposit such deeds as above directed, and the said Theodore Shillaber and the said Silas Noble should fail or neglect to pay to said Robinson or to said clerk within the said time of ninety days the said sum of $4,249.58 and interest, then the said clerk should deliver up to said Robinson said deeds made by him to said Theodore Shillaber for said Flatbush lots and lands in Sullivan and Essex Counties, in the State of New York; and the said Robinson thereupon and at the same time should execute and deliver to said Silas Noble a trust-deed for said lots and lands, in terms that the said Silas Noble should proceedto sell the same in such manner, and giving such reasonable

Folio 20 of bill.

Folio 21 of bill.

Folio 22 of bill.

152

Folio 23 of bill.

Folio 24 & 25 of bill.

153 notice of the time and place of said sale, as might be usual or provided by law in the said State of New York, and should make, execute, and deliver to the purchaser or purchasers thereof good and sufficient legal titles for the same, and out of the proceeds of such sale should pay, first, the expenses of such trust, and afterwards the said sum of money so due to the said Robinson, and interest, and should hold the balance subject to the further order of said court; and that if the said Silas Noble or the said Theodore Shillaber should pay to said Robinson or to the said clerk the said sum of $4,249.58 and interest within the said ninety days, then the said deeds made by the said Robinson for said property in New York should be delivered to the said Theodore Shillaber or to his authorized agent, and should vest in him a good and perfect title to said property therein described.

Folio 26 of bill.

6th line of folio 26; fos. 27, 28 of bill.

And it was further adjudged by the said decree that the said Theodore Shillaber should, within the said ninety days, on the said Robinson complying with the terms of said decree, execute and deliver to said Robinson a release of all the rights and equity of redemption of the said Theodore Shillaber in and to the said property and premises in the State of Illinois, called the La Grange Farm, and in and to such portion of said lands called Buena Vista, which are situate within the county of Ogle, in said State; and
154 that, upon the failure of the said Theodore Shillaber to do so, the said decree should be taken as a lien on all the right, title, and interest of said Theodore Shillaber in said lands and premises as heir at law of the said John Shillaber, deceased; and that the said Theodore Shillaber should, upon the compliance with the provisions of said decree on the part of said Robinson, be barred and foreclosed of all right, title, and equity in the said premises and lands.

The said decree also provided for the execution and delivery, by or on behalf of other parties to said suit, to said Robinson, of such conveyances and releases as by the said court were adjudged necessary and proper in order to assure to the said Robinson a good and absolute title, in fee-simple, to the said premises and lands in Illinois free and clear of all incumbrances.

See bill, 11th line of folio 27 to 6th line of folio 28.

8th line of folio 33, & folio 34 of bill.

In pursuance of the said decree, the said Robinson duly executed and deposited with the clerk of said court, within ninety days from the date of said decree, a good and sufficient conveyance, duly acknowledged according to the laws of the State of New York, and running to the complainant in the present suit as heir at law of the said John Shillaber, deceased, for the said three sections or lots of land in Clarkson street, in the village of Flatbush, Kings County; and also for the said tract of four hundred and twenty acres of land situate in the town of Fallsburgh, in Sullivan County;
155 and also to said tract of seventy-four acres of land situate in the town of Minerva, Essex County, all in the State of New York, and the said Robinson thereupon entered into possession of the said premises and lands in the State of Illinois above described, and received from such parties to the said suit as were directed by the said decree to execute the same all such conveyances and releases as by the said decree were adjudged necessary or proper to assure to the said Robinson an absolute title in fee-simple to said premises and lands free and clear of all incumbrances.

Middle of folio 34 to middle of folio 35 of bill.

No money was ever paid or caused to be paid by the complainant in the present suit, or by the said Silas Noble, to the said Robinson, or to

See bill, 4th line of folio 36 to end thereof.

the clerk of said court; and at the expiration of ninety days from the date of said decree, the clerk, in pursuance of said decree, delivered to said Robinson the said deed made by him to the complainant, and deposited by him with said clerk, as aforesaid; and the same was cancelled and annulled by the said Robinson.

Folio 36 of bill.

It is pretended by said Robinson (the defendant in this suit) that he thereupon made and delivered to said Silas Noble a deed for said Flatbush lots and for said lands in Sullivan and Essex Counties, in the State of New York, which deed was a trust-deed in the form and with the powers and directions provided for by said decree.

But no such deed has ever been recorded in

156 Last four lines of folio 37 to middle of folio 38.

either of the counties of Kings, Sullivan, or Essex, in the State of New York, and no actual or constructive notice of any suit or proceeding to foreclose the equity of redemption of the complainant in said lots or lands, or any part thereof, has ever been served on the complainant, or given or published by the said Silas Noble, or by any other person in any manner.

Middle of folio 38 to middle of folio 39 of bill.

Since the time of the pretended execution and delivery of said trust-deed by the defendant to the said Silas Noble, the defendant has sold and conveyed to divers persons, neither of whom had notice of the above-mentioned agreement made between the defendant and the said John Shillaber, or of the said decree or of the execution of any such trust-deed by the defendant to the said Silas Noble, the whole of said lots in Flatbush, Kings County, and of the said lands in Sullivan and Essex Counties, in the State of New York, and has received from said parties, in consideration of said sales, large sums of money, which he has wholly appropriated to his own use.

Folio 39 of bill.

Middle of folio 39 of bill.

The defendant pretends to have become the purchaser of said Flatbush lots and lands in Sullivan and Essex Counties, at a sale or sales thereof, made by the said Silas Noble under and by virtue of the said decree; but the complainant's bill in the present suit expressly charges the truth to be that if any sale of said lots, or of said lands, or of any part thereof, ever was made by the said

157 Noble to the defendant, it was not made in conformity with the provisions of said decree, but in evasion thereof, and in violation

See bill, 6th line of folio 39 to 13th line of folio 40.

of the trust imposed upon the said Noble thereby, and by a fraudulent connivance between the said Noble and the defendant to defeat the provisions of said decree in favor of the complainant, and was not made in such manner or after giving such reasonable notice of the time and place thereof as is usual and provided by law in the State of New York in cases of sales under mortgages of real estate as is prescribed by said decree.

Since the date of said decree there has been a very great rise in the value of real estate in the county of Kings, and a considerable rise in the value of real estate in the counties of Sullivan and Essex, in the

See bill, 13th line of folio 40 to 3rd line of 42.

State of New York, and at the time of the sale by the defendant of the three lots or sections of lands in Flatbush, Kings County, and of the said lands in Sullivan and Essex Counties, to divers persons as above alleged, the said Flatbush lots were worth at least fifteen thousand dollars, and the said lands in Sullivan and Essex Counties were worth at least six thousand dollars, making, in all, the sum of at least twenty-one thousand dollars.

See bill, 4th line of folio 42 to 8th line thereof.

The defendant has been requested, on behalf of the complainant, to render to the complainant an account of said sales, but has refused and neglected to do so.

158 The said Silas Noble is a non-resident of the State of New York, and could not (at the date of the filing of the bill in this suit) be found therein.

See bill, 9th to 12th lines of folio 42.

The bill also charges the following facts, viz: That there is an obvious error in the account stated in the above-mentioned decree between the said Robinson and the said Theodore Shillaber, in this, that although the said Robinson is credited in said account with the entire rents and profits from the date of said agreement to the date of said decree of the lands in the State of Illinois, which, by said decree, are adjudged to be conveyed by the said Theodore Shillaber to him, he is only charged in said account with interest during the same period on a portion of the sum of $11,695.32, which is the amount of consideration-money found by said decree to be due by said Robinson to the said Theodore Shillaber for said lands; that is to say, upon the sum of $4,692.32. That upon the theory on which the said decree was framed, and by the clear intent and purview of its provisions, the said Robinson should have been charged in said account with interest on the whole of said consideration-money from the date of said agreement to the date of said decree; that the interest on the portion of the consideration-money not so charged to said Robinson, to wit, on $7,000 from the date of said agreement to the date of said decree, amounts to the sum of $3,879.13; which sum, if it had been charged to said Robinson on the said account, would have reduced the balance of said account against said Theodore Shillaber from the said sum of $4,240.58, as incorrectly stated in said decree, to the sum of $361.45. That at the time of the making and settling the said final decree, the said Theodore Shillaber was absent from the State of Illinois, and was not represented by attorney or counsel. That his pecuniary affairs were then, and for many years afterwards, very much embarrassed, and he was not able to pay for the services of legal counsel in said matter, and only discovered a few days before the commencement of this suit the said error in said decree, but that said error is so glaring and produced results so improbable, that it could not have received or misled the said Robinson or his attorney in said suit, and that neither the said Robinson, nor his said attorney, was so deceived or misled, but that, on the contrary, the said Robinson or his said attorney, intending to defraud the said John Shillaber of the said sum of $3,879.13, purposely caused the said decree to be so ingeniously worded as to appear on a superficial examination thereof to fully carry out the decision of said court, and to charge the said Robinson with all the interest which under said decree was due by him to the said Theodore Shillaber.

See bill, 11th line of folio 29 to 3rd line of folio 30.

See bill, 3rd line of folio 30 to 12th line thereof.

159 See bill, 13th line of folio 30 to 11th line of folio 31.

See bill, 13th to 17th lines of folio 31.

See bill, 14th line of fol. 31 to 7th line of folio 33.

160 The bill contains special interrogatories, and calls for specific answers thereto, and prays, first, for an account of the rents and profits of said New York lands since 10th December, 1860; second, an account of all sums of money received by the defendant since 10th of December, 1860, for proceeds of sale of said lands, or any part thereof; third, that the alleged error in the account referred to in the bill may be corrected; fourth, that the defendant be adjudged to pay to the complainant whatever balance may appear to be due him on such accounting; fifth, that the complainant may have such further relief or may have such other relief as the nature of his case shall require, and as shall be agreeable to equity and good conscience.

The first answer of the defendant was filed on May 10, 1872, and a further answer was filed July 5, 1872.

That the answers of the defendant admit all the allegations and statements contained in the bill of complainant down to the end of line 12 of folio 42 thereof, except as follows:

The defendant denies that there was any collusion between him and the said Noble in the sale of the New York lands by Noble to him, or any intention on the part of the defendant to defraud said Shillaber.

The defendant also denies that there is any error or mistake in the said Illinois decree.

161 The defendant also denies that the deed which he executed to Noble in pursuance of said Illinois decree was a mortgage, and alleges that by said deed Noble obtained title to said lands in fee.

The defendant also denies that at the time he sold the said Flatbush lots they were worth the sum of $15,000, or that at the time he sold the said lands in Essex and Sullivan Counties they were worth $6,000. That the answers allege the following facts: That at the expiration of ninety days from the entry of the Illinois decree, the clerk redelivered to him the deed which, in pursuance of said decree, he had executed to the said Shillaber of the said New York lands, and deposited with the said clerk, and that the said deed is now in the possession of the defendant; a copy of said deed is annexed to the defendant's first answer.

That since the delivery of said deed to him by said clerk the defendant has conveyed the whole of said lots and tracts in Flatbush, Kings County, and in Sullivan and Essex Counties, as follows: The said lots in Flatbush, section 13 thereof to Thomas Rice, for $1,805; section 14 and part of section 15 to Robert Stewart, for $4,000, and the balance of section 15 to Philip S. Crooke, for $2,000. The said lands in Essex County, to John Carl, junior, for the sum of six hundred and

162 twenty-three dollars and seventy-two cents. The said lands in Sullivan County, to Elizabeth Clarke, for the sum of twelve hundred dollars.

That the consideration for said sales was received as follows:

$1,805	from	Thomas Rice, Dec'r 18, 1860.
4,000	"	Robert Stewart, Nov'r 1, 1867.
2,000	"	Philip S. Crooke, Nov'r, 30, 1868.
623	"	John Carle, jr., Jan'y 28, 1863.
1,200		Elizabeth Clark, June 7, 1865.
$9,628		

That on the 6th December, A. D. 1860, the defendant and wife executed a trust-deed to the said Silas Noble, in pursuance of the said Illinois decree, a copy whereof is annexed to the first answer, "marked A," which has never been recorded, and is now in the possession of the defendant. That the 16th day of March, 1861, the said Silas Noble executed deeds of all said New York lands to John A. Robinson, who purchased said lands for the defendant for the price or sum of $1,950, which was the highest price for said lands at a sale thereof, which was made by said Noble on that day.

That notice of such sale was published six weeks previous thereto in the Brooklyn Standard, a newspaper published in the city of Brooklyn, Kings County; such notice was published once a week for six

163 weeks immediately previous to the time of sale, and a copy thereof is annexed to the answer; that such sale was made by the said

Noble, and such purchase was made by the defendant in good faith. That the said deeds are in the possession of the defendant, and copies thereof are annexed to his answer.

That the defendant paid to the said Noble the whole of the purchase-money therefor, by crediting him therefor on the amount payable by said Noble under the said Illinois decree.

That the defendant never received any rents or profits from any of said lands, but paid taxes thereon. That a general replication was filed by the complainant on August 5, 1872.

That the cause came on for final hearing upon the pleadings and proofs therein at a stated term of the circuit court of the United States for the eastern district of New York, held at the city of Brooklyn, on the 24th day of May, 1873.

That on the 2nd day of July, 1873, a final hearing was made and pronounced in the cause by the said court, wherein it was adjudged and decreed that the complainant's said bill be dismissed with costs. Wherefore this appellant appeals from the whole of said decree of said circuit court of the United States, and respectfully prays that the decree of the said circuit court, and the bill, answers, pleadings, depo-
164 sitions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed, with costs, and a decree made granting to the said complainant the relief prayed for in his said bill, or such other decree as to the said Supreme Court shall seem just.

Dated—

165 (Indorsed:) U. S. circuit court. Theodore Shillaber, complainant & appellant, vs. John Robinson, defendant & respondent. Appeal. Coles Morris, soli. compl't, 15 Nassau st., N. Y. Filed October 30th, 1873.

166 *Bond for costs.*

Circuit court of the United States of America for the eastern district of New York, in the second circuit.

THEODORE SHILLABER
vs.
JOHN ROBINSON.

Know all men by these presents that we, Frederick Billings and Coles Morris, are held and firmly bound unto the above-named John Robinson, of Brooklyn, State of New York, in the sum of two hundred dollars, to be paid to the said John Robinson, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the twenty-first day of October, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas the above-named Theodore Shillaber [ha' prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such, that if the

above-named Theodore Shillaber shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make his said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

FREDERICK BILLINGS. [L. S.]
COLES MORRIS. [L. S.]

Sealed and delivered, and taken and acknowledged, this 21st day of October, 1873, before me.

[L. S.]

O. P. C. BILLINGS,
Notary Public, New York County.

167 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

Frederick Billings and Coles Morris, of the city of New York, being severally duly sworn, each for himself doth depose and say that he is a householder within the city of New York, and that he is worth the sum of five hundred dollars over and above his just debts and liabilities.

FREDERICK BILLINGS.
COLES MORRIS.

Sworn to this 21st day of October, A. D. 1873, before me.

[L. S.]

O. P. C. BILLINGS,
Notary Public, New York County.

(Indorsed:) Vol. , page . U. S. circuit court. Theodore Shillaber vs. John Robinson. Bond for costs on appeal. Coles Morris, proctor. Filed this 30th day of October, 1873.

I approve of the within bond as to its form and its sufficiency to operate as a supercedeas.

WARD HUNT,
Ass. Just., Sup. Ct. U. S.

168 By the honorable Ward Hunt, one of the justices of the Supreme Court of the United States.

To JOHN ROBINSON:

Whereas Theodore Shillaber has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the eastern district of New York, made in favor of you, the said John Robinson, and has filed the security required by law:

You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the 13th day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Brooklyn, in the eastern district of New York, in the second circuit, the 30th day of October, in the year of our Lord one thousand eight hundred and seventy-three. Allowed.

WARD HUNT,
Asso. Just. Sup. Ct. U. S.

(Endorsed:) U. S. circuit court. Theodore Shillaber, complainant and appellant, vs. John Robinson, defendant and respondent. Citation. Filed October 30th, 1873.

169 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, Samuel T. Jones, clerk of the circuit court of the United States of America for the eastern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one (1) to one hundred and thirty-eight (138) inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Theodore Shillaber, complainant, vs. John Robinson, defendant, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, in the second circuit, this 14th day of January, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the said United States the ninety-eighth.

[SEAL.] SAMUEL T. JONES, *Clerk.*
By E. B. HUSTED, *Deputy.*

(Indorsement on cover:) No. 181. Theodore Shillaber, appellant, vs. John Robinson. E. New York C. C. U. S. Filed 17th October, 1874.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1877.

No. 25.

THEODORE SHILLABER,

Complainant and Appellant,

versus

JOHN ROBINSON,

Defendant and Appellee.

Brief in behalf of Appellant on Appeal from the Circuit Court of the United States for the Eastern District of New York.

MICHAEL H. CARDOZO,

Of Counsel for the Appellant.

NEW YORK:

BENJ. H. TYRREL, LAW, BOOK AND JOB PRINTER, 74 MAIDEN LANE.

1877.

IN THE

Supreme Court of the United States.

THEODORE SHILLABER,

Complainant and Appellant,

vs.

JOHN ROBINSON,

Defendant and Appellee.

Brief in behalf of Appellant.

No. 25. October Term, 1877.

STATEMENT OF FACTS.

On the 12th October, 1852, a written contract was made between John Shillaber, the father of this complainant, and the defendant, John Robinson, which is substantially set out in the bill in this suit. (See Transcript of Record, pages 1 and 2, folios 1to 7; also pages 34 to 36, folios 113 to 117.)

By this instrument the said John Shillaber agreed to sell to the said Robinson about four thousand acres of land, in the State of Illinois, at the rate of six dollars and seventy-five cents per acre, making in all the sum of twenty-seven thousand dollars. (See Transcript of Record, pages 1 and 2, folios 4 and 5: also page 34, folio 113.)

In part payment of this sum Robinson agreed to convey to the said John Shillaber, three sections or lots of land situate upon Clarkson street, in the village of Flatbush, in Kings county, in the State of New York, at the stipulated price of three thousand dollars; and about four hundred and ninety-four acres of land in Sullivan and Essex counties, in the State of New York, at the stipulated price of four thousand dollars, in all seven thousand dollars. (Transcript of Record, page 2, folios 5 and 6; also page 35, folios 114 and 115.)

The deeds of conveyance of the lands so purchased by the said Robinson and of those so to be conveyed by him in part payment therefor, were to be executed with all reasonable dispatch, and were to be sufficient in the law to convey good and indefeasible titles in fee simple, free from all incumbrances, to the parties respectively entitled thereto. (Transcript of Record, page 2, folio 6; also page 35, folio 115.)

For some reason, which does not expressly appear, the said John Shillaber refused to perform this contract, and a suit was commenced against him by Robinson, in the Court of Chancery of the State of Illinois, to enforce a specific performance thereof. (Transcript of Record, pages 2 and 3, folio 7.)

During the pendency of this suit, and before any hearing in the same was had, the said John Shillaber, who had duly appeared therein, died, and the suit was afterwards revived by making parties thereto the complainant in this suit, who is the only heir-at-law of the said John Shillaber, and one Silas Noble, to whom letters of administration of the estate of said John Shillaber had been duly granted by the County Court of Ogle county, in the State of Illinois. (Transcript of Record, pages 2 and 3, folio 7.)

In October, 1855, an interlocutory decree (Transcript of Record, page 3, folios 7 and 8; see also, pages 23 to 26, folios 75 to 84,) was made in said

suit, by which it was adjudged that the said John Shillaber and this complainant, as his heir-at-law, had unreasonably refused to perform the said contract of sale, and that there ought to be a specific performance thereof. (Transcript of Record, page 3, folios 7 and 8; also page 24, folios 76 and 77.)

That the said Robinson should convey to this complainant the said lots and tracts of land in the State of New York (Transcript of Record, page 24, folio 77), and that upon the execution and delivery of such conveyance, and the payment of the residue of the purchase price of the said lands in the State of Illinois, this complainant should convey the same to the said Robinson (Transcript of Record, pages 24 and 25, folio 78); and it was further ordered by the said interlocutory decree, that the cause should be referred to Joseph Lewis, as a special master of the Court, to take further testimony therein, and hear the further proofs and allegations of the parties, and that he should report his doings therein to a subsequent term of the Court. (Transcript of Record, page 3, folio 8; also pages 25 and 26, folio 81.)

On 10th September, 1860, a final decree (Transcript of Record, pages 27 to 35, folios 85 to 111) was made and entered in said suit, at a Circuit Court, sitting as a Court of Chancery, in and for the county of Rock Island, in the State of Illinois, which decree was enrolled, and is still in full force and effect. (Transcript of Record, pages 3 to 6, folios 8 to 15.)

At the time this decree was settled and entered, this complainant was absent from the State of Illinois, and was not represented by solicitor or counsel, being unable, from pecuniary embarrassments, to obtain and pay for legal services in the matter. (Transcript of Record, page 6, folios 19 and 20.)

By this decree it was adjudged that this complainant, as heir-at-law of said John Shillaber, could make title, at that time, to but one thousand seven hundred and thirty acres, or thereabout, of

the Illinois lands described in said contract of sale, which amounted in value, at the contract price of six dollars and seventy-five cents per acre, to the sum of eleven thousand six hundred and ninety-five dollars and thirty-two cents; (Transcript of Record, page 3, folio 9, also page 29, folio 91), and an account was stated by the said decree between this complainant, as such heir-at-law, and the said Robinson, in which, this complainant is credited with the said sum of eleven thousand six hundred and ninety-five dollars and thirty-two cents, and is charged with the sum of seven thousand dollars, the stipulated price of the New York lands (which by the said interlocutory decree had been directed to be conveyed by said Robinson to this complainant,) (Transcript of Record, page 3, folio 8; also page 24, folio 77), leaving a balance in favor of this complainant of four thousand six hundred and ninety-five dollars and thirty-two cents. (Transcript of Record, page 3, folio 10; also page 29, folio 92.) Interest was allowed to this complainant upon this balance (*but by a singular inconsistency, not upon the remainder of the said sum of eleven thousand six hundred and ninety-five dollars and thirty-two cents*) from the date of the said contract to the date of the said decree. (Transcript of Record, page 3, folio 10; also page 29, fol. 93.) On the other hand, Robinson was credited in the said account with the *entire* rents and profits of the said Illinois lands, from the date of said contract to the date of said decree, and with other large sums of money for incumbrances thereon and damage thereto, amounting in the whole to the sum of eleven thousand one hundred and eighty-one and forty-three one hundredths dollars, and the result of the account, so stated, was to leave this complainant indebted to the said Robinson in the sum of four thousand two hundred and forty-nine and fifty-eight one hundredths dollars. (Transcript of Record, pages 4 and 5, folios 11 to 14; also pages 29 to 31, folios 93 to 100.)

The decree provides for the conveyance to Robinson of the said Illinois lands in fee simple, free from all incumbrances, (Transcript of Record, page 24, folio 78,) but declares that Robinson ought not in equity and good conscience to be required to convey to this complainant the said New York lands, without some *security or lien* upon the same for the payment to him of the said sum of four thousand two hundred and forty-nine and fifty-eight one hundredths dollars, (Transcript of Record, page 31, folio 101,) and that the same ought to be paid to him in a reasonable time, or that he be *permitted to enforce the payment of the same from and out of said lands, and have the same sold for that purpose*, (Transcript of Record, page 31, folio 101,) and it was thereupon further adjudged, by the said decree, that Robinson should execute to this complainant, and deposit with the clerk of said Court, a good and sufficient deed of conveyance, under the laws of the State of New York, of such lands, to be held by said clerk in escrow for ninety days from the date of the said decree, and to be delivered by him to this complainant upon payment of the said sum of four thousand two hundred and forty nine and fifty-eight one hundredths dollars and interest. (Transcript of Record, pages 4 and 5, folio 13; also page 32, folios 105 and 106.)

But that in default of such payment within that time, the said conveyance should be returned by said clerk to the said Robinson, who should thereupon and at the same time execute and deliver to the said Silas Noble a *trust deed* for said New York lands, in terms, that the said Noble should proceed to sell the same in *such manner and after giving such reasonable notice of the time and place of sale as might be usual or provided by law in the State of New York*, and should execute and deliver to the purchaser or purchasers thereof good and sufficient legal titles for the same, and out of the proceeds of such sale, should pay, first, the expenses of such trust, and afterwards the said sum of

four thousand two hundred and forty-nine and fifty-eight one hundredths dollars and interest, and should hold the balance subject to the further order of said Court (Transcript of Record, pages 5 and 6, folios 15 to 17; also pages 33 and 34, folios 109 and 110.)

In compliance with the requirements of the said decree a proper deed of conveyance of the said New York lands was executed by Robinson and his wife to this complainant, and deposited with the clerk of said Court. (Transcript of Record, page 7, folios 20 and 21.)

No part of the said sum of four thousand two hundred and forty-nine and fifty-eight one hundredths dollars was ever paid, and at the expiration of ninety days from the date of the said decree such deed was delivered back by the Clerk to Robinson, who thereupon, and at the same time, together with his wife, executed and delivered to the said Silas Noble a trust deed, so-called, of the said New York lands, a copy whereof is annexed to the defendant's answer, marked A. (Transcript of Record, page 7, folios 21 and 22; also page 13, folios 40 and 41; also pages 15 to 17, folios 49 to 54.)

In the early part of the year 1861 a notice of the sale of the said lands, of which a copy is also annexed to the defendant's answer, was published in the *Brooklyn Standard*, a newspaper published in the City of Brooklyn, in Kings County, State of New York. (Transcript of Record, page 14, folio 46; also page 21, folio 65.) This notice was so published once or twice a week for six weeks immediately previous to the 16th March, 1861, on which day a sale of all the said lands was made by said Noble to one John *A.* Robinson (Transcript of Record, page 13, folio 45), *who purchased the same for the defendant*, John Robinson, for the sum of nineteen hundred and fifty dollars (Transcript of Record, page 13, folio 42), being fifteen hundred dollars for the said lots in Flatbush, Kings county, and four hundred and ninety-four dollars for the

said lands in Sullivan and Essex counties, and thereupon the said Noble made and executed to the said John A. Robinson, two several deeds of the said lands, copies whereof are also annexed to the defendant's answer. (Transcript of Record, page 14, folio 45; also pages 19 to 20, folios 60 to 63). No part of the purchase money for said lands was ever paid by the defendant Robinson to the said Noble, except by crediting him therefor on account of the sum payable to the said Robinson under the said decree. (Transcript of Record, page 14, folio 45). Neither the said trust deed nor either of said deeds from Noble to the said John A. Robinson has ever been recorded in either the counties of Kings, Sullivan, or Essex, in the State of New York (Transcript of Record, page 7, folio 23), and the defendant Robinson, subsequently to the said 16th day of March, 1861, sold and conveyed to divers persons, neither of whom had any knowledge or notice of the said contract of sale, or of the said decree, the whole of the said New York lands, as follows: Section 13 of said Flatbush lands on December 18, 1861, to one Thomas Rice, for one thousand eight hundred and five dolllars; Section No. 14, and part of Section No. 15, of said lands on November 1st, 1867, to one Robert Stewart, for four thousand dollars; and the remainder ofSection No. 15 of said Flatbush lands on November 30th, 1868, to one Philip S. Crooke, for two thousand dollars; the said lands in Sullivan County on the 7th day of June, 1865, to Elizabeth Clarke, for one thousand two hundred dollars; and the said lands in Essex County on the 28th day of January, 1863, to John Clarke, for six hundred and twenty-three and seventy-two one hundredths dollars, and duly received the said sums of money at the respective dates above-mentioned, and has appropriated the same to his own use. (Transcript of Record, page 14, folios 44 to 45). This complainant had no notice of the proceedings of the said Noble, under the said decree for the sale of the said New York lands, and

no other proceeding to foreclose the complainant's equity of redemption in the said lands, or any part thereof, has ever been taken by the said Noble or any other person. (Transcript of Record, pages 7 and 8, folio 23.) The defendant, prior to the commencement of this suit, was requested, on behalf of the complainant, to render to him an account of the sales above-mentioned, but refused so to do. (Transcript of Record, page 8, folio 25.)

The said Noble, at the time of the commencement of this suit, was a non-resident of this State, and could not be found therein. (Transcript of Record, page 8, folio 25.)

Upon the entry of the said decree, Robinson went into possession of the said Illinois lands, and received from the parties who were directed by the said decree to execute the same, all such conveyances and releases as were necessary or proper to assure to him an absolute title in fee-simple to the said lands, free from all incumbrances. (Transcript of Record, page 7, folio 21.)

At the end of folio 43, page 14, of the Transcript of Record, the defendant in his answer admits the allegations and statements contained in the bill of complaint not thereinbefore specifically admitted or denied down to the end of line 12, folio 42, of the original bill. This corresponds to the end of folio 25, page 8, of the printed transcript, *i. e.*, the interrogating part of the bill.

This cause came on to be heard on the 24th day of May, 1873, before Mr. Justice Ward Hunt (Transcript of Record, page 44, folio 138), and, after argument on both sides, the cause was submitted, and subsequently, on the 15th day of October, 1873, a decree was entered that the complainant's bill of complaint in the action be dismissed, with costs (Transcript of Record, page 46, folio 145). An opinion by Mr. Justice Hunt was rendered, which is set out on pages 44, 45 and 46 of the Transcript of the Record herein (folios 139 to 145).

STATEMENT OF ERROR.

The complainant thereafter duly prosecuted his appeal to this Court, and an abstract of the pleadings, proofs, and proceedings herein is set out on pages 46 to 53 (folios 148 to 165) of the Transcript of the Record herein. The appellant insists that the decree of the said Circuit Court, and every part thereof, is erroneous, in that it refused to grant to the appellant the relief prayed for in his bill of complaint, and dismissed the said complaint with costs, whereas it should have granted to the said appellant such relief.

ARGUMENT.

First.

The defendant, John Robinson, must account, as trustee of this complainant, for all the moneys which he received on the sales of the New York lands mentioned in the complainant's bill of complaint, amounting, in the aggregate, to the sum of nine thousand six hundred and twenty-eight dollars (see Transcript of Record, page 14, folio 44), together with interest on the proceeds of such sales from the times when they were respectively made.

A. The decree of the Illinois Court stated an account between the parties then before it. The complainant Shillaber was charged with the full contract price of the New York lands (Transcript of Record, page 3, folios 9 and 10; also page 29, folios 91 and 92). This constituted a payment for the same, and passed the *equitable* title in those lands to Shillaber, leaving the bare *legal* title in Robinson, he holding the lands in trust for the complainant.

Hill on Trustees, page 171 (star paging).
Bispham on Principles of Equity, §§ 95, 364.

The decree of the Court operated as the means of changing the status of each of the several parties, and from it all their rights and liabilities arise, and to it we must look to determine those rights and liabilities. By the decree specific performance was enforced; the Illinois lands by it were transferred directly to Robinson, the New York lands to Shillaber; and this though the Court has no jurisdiction over the subject matter, provided it has jurisdiction of the person.

Massie *vs.* Watts, 6 Cranch, 148.
Brown *vs.* Desmond, 100 Mass., 267.
Fry on Specific Performance, § 63.
Northern Ind. R. R. Co., *vs.* Michigan Central R. R. Co., 15 How. 233.

A Court of Equity of competent jurisdiction can adjust the equities of the parties before it, and, in accordance with a familiar principle, it regards that, agreed to be done, as already performed.

Story Equity Juris., § 64 (*g*).
Hill on Trustees (*ut supra*).

B. The Court in so adjusting the equities adjudged that the defendant Robinson should not be required to convey the New York lands to Shillaber, to part with the legal title still remaining in him, *without some security or lien thereon* for the payment to him of the balance found due by the decree, in the account stated, to Robinson from this complainant, and that the same ought to be paid within a reasonable time (see Transcript of Record, page 31, folio 101). The Court then proceeds to furnish means for the creation and enforcement of this *lien* (see Transcript of Record, page 31, folios 101 and 102). Robinson was directed to make a deed of the New York lands and deposit the same with the clerk of the Court. In case Shil-

laber should pay the balance so found due, the deed should be delivered to him; otherwise, after the expiration of ninety days from the date of the decree, the *lien*, created by the decree, was to be *foreclosed, and as a means of so foreclosing this lien, a trust deed* was to be executed to one Silas Noble, of the said lands, and he was to proceed to sell the same "*in such* " *manner and after giving such reasonable no-* " *tice of the time and place of such sale as* " *might be usual or provided by law in the* " *State of New York.*"

(See Transcript of Record, pages 32 and 33, folios 105 to 109.)

The general intention of these provisions was to constitute Robinson a mortgagee, and this complainant a mortgagor of the lands in question, and it is a leading maxim of construction that the intention of the parties is the controlling element.

Mitchell *v.* Tilghman, 19 Wall, 387, 395, Clifford, J.
Shays *v.* Norton, 48 Illinois, 100.

(*a.*) The decree and all its provisions must be construed in the light of all the circumstances under which it was made, and the intention of the Illinois Court, as determined by the words of the decree, and the relative situation of the subject matter, must give shape to the transaction.

Nash *v.* Towne, 5 Wall, 689.

The language of Mr. Justice Clifford (Page 699.) applies with apparent and equal force to the case under consideration, when he says: " Courts, in the construction of contracts, " look to the language employed, the subject " matter, and the surrounding circumstances. " They are never shut out from the same

"light which the parties enjoyed when the "contract was executed, and in that view "they are entitled to place themselves in the "same situation as the parties who made the "contract, so as to view the circumstances "as they viewed them, and so to judge of the "meaning of the words and of the correct "application of the language to the things "described."

(1.) The terms "trust deed," and "mortgage," are used in Illinois and other western States, if not synonymously, at least interchangeably. The statutes and decisions of the Courts of that State show that this is the fact.

Adams & Durham's Real Estate Statutes and Decisions of Illinois, 202, 1702.

McQuie *v.* Peay, 58 Mo. 56.
Pardee *v.* Lindley, 31 Ill. 174.
Wilson *v.* McDowall, 78 Ill. 514.

In these last two cases, the terms are applied indiscriminately to the same instrument. And the courts of the United States, will take judicial notice of the laws and judicial decisions of the several states.

Junction R. R. Co. *v.* Bank of Ashland, 12 Wall., 226.
Bradley, J. at p. 229.
Cheever *v.* Wilson, 9 Wall., 108.
Swayne, J., p. 121.

(2.) The distinction between trust deeds and mortgages, is at the most only a technicality (Wilkins *v.* Wright, 6 McLean 340), and it is laid down by more than one authority of weight, that they are in legal effect the same.

Coe *v.* Johnson, 18 Indiana, 218.
Coe *v.* McBrown, 22 Indiana, 252.
In re Bondholders of York and Cumberland Railway, 50 Me. 552.
Woodruff *v.* Robb, 19 Ohio, 212.
Dillon, J. in 2 Am. Law Reg, N. S. 648.

MR. JUSTICE DILLON, in an able and exhaustive article (*ut supra*) upon the subject of trust deeds says:

"A mortgage with a power of sale and a "deed of trust where the power of sale is "placed in a third person, are in substance "the same. Some of the cases have denied "this. But those taking this view are "numerous."

In the case at bar, the power of sale is placed in Noble, a third person, (Transcript of Record page 5, folio 15).

(*b.*) The fact that the decree of the Illinois Court, calls the instrument from the defendant to Noble a "trust deed," (Transcript of Record page 33. folio 109), is not of governing importance. With that instrument the complainant is only connected by means of the other proceedings. The deed, as between Robinson and Noble, may be a technical trust deed, but it cannot affect the rights of a third party, not a party to the instrument. The defendants would have it that this instrument acted of itself to divest the complainant Shillaber, of his interests in the lands in question, in this manner changing the position of the complainant from that of a mortgagor, acquired under the decree, to that of a grantor, so violating the cardinal principle of the law of real estate, "Once a mortgage always a mortgage."

2 Washburn on Real Property, (3d Ed.) page 67.
Coote on the Law of Mortgages, page

(*c.*) The decree expressly declares, that the object of giving the trust deed and of making all the provisions concerning the New York lands, is to give Mr. Robinson a *security or lien* (see transcript of record, page 31, folio 101), upon the lands, which in equity, belonged to Shillaber, he having paid an equivalent, the contract price charged against him in the settlement of the various equities.

It is a well known and long established principle of equity jurisprudence, that any transaction of whatever form, devised for the purpose of securing the payment of money is a mortgage. Authority upon this subject is superfluous, but *en passant*, see

Hughes *v.* Edwards, 9 Wheat. 489.
Story Eq. Juris., § 1018.
Flagg *v.* Mann, 2 Sumner, 486.
Conway's Ex'rs *v.* Alexander, 7 Cr. 218.
Coote's Law of Mortgages, page 11.
Shays *v.* Norton, 48 Ill. 100.
Villa *v.* Rodriguez, 12 Wallace, 323.

Mr. Justice Dillon (2 Am. Law Reg. 648.) well says. "No doctrine is more in-"vincibly established than that every in-"strument *intended* to secure the payment "of money or the performance of some "collateral act, is a mortgage. This is "the test: '*If a transaction resolve itself* "*into a security, whatever may be its* "*form, and whatever name the parties* "*may choose to give to it, it is in equity a* "*mortgage*', Per Story, J. (2 Sumner, "533.)"

And Courts of Equity lean towards construing doubtful instruments as mortgages.

Conway's Exr's *v.* Alexander (*supra*).
Holmes *v.* Grant, 8 Paige, 243, 258.
Horn *v.* Keteltas, 46 New York, 605.

The rule, and the reason of it, are stated by Marshall, *Ch. J.*, in Conway's Exr's *v.* Alexander (at page 237), as follows: "As "lenders of money are less under the "pressure of circumstances, which control "the perfect and free exercise of the judg- "ment than borrowers, the effort is fre- "quently made by persons of this descrip- "tion to avail themselves of the advantage "of this superiority, in order to obtain "inequitable advantages. For this reason, "the leaning of courts has been against "them, and doubtful cases have generally "been decided to be mortgages."

C. There are three methods of foreclosing a mortgage under the New York laws, and since the intention of the proceedings had in Illinois demands that the "trust deed" be construed as a mortgage, either one of these methods must be adopted, or the equity of redemption remains.

(1.) By the decree of a competent court.

(2.) By the proceedings prescribed in part iii., chapter 8, title 15th, of the New York Revised Statutes, commonly called foreclosure by advertisement.

(3) By lapse of time as by the failure of the mortgagor to enforce his remedy against a mortgagee in possession for more than twenty years, by analogy to the statute of limitation.

Hughes *v.* Edwards, 9 Wheaton, 489.

Demarest *v.* Wynkoop, 3 Johns., Ch. 129.

Lawrence *v.* Farmers' Loan and Trust Co., 3 Kern., 200.

Neither the 1st nor 3d of these methods have any application to the case in question.

In the case of Lawrence *vs.* The Farmers' Loan and Trust Co. (*supra*), as in this the instrument under which the sale was made, was not *technically* a mortgage, but a trust deed which the Court held to contain all the essentials of a mortgage, and that it must be foreclosed by advertisement.

(*a.*) The provisions of the New York Revised Statutes, regarding notice, are as follows:

"§ 3. Notice that such mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given as follows:

"(1.) By publishing the same for twelve weeks successively, at least once in each week, in a newspaper printed in the county where the premises intended to be sold shall be situated, or if such premises shall be situated in two or more counties, in a newspaper printed in either of them.

"(2.) By affixing a copy of such notice, at least twelve weeks prior to the time therein specified for the sale, on the outward door of the building where the county courts are directed to be held, in the county where the premises are situated; or if there be two or more such buildings, then on the outward door of that which shall be nearest the premises. And by delivering a copy of such notice, at least twelve weeks prior to the time therein specified for the sale, to the clerk of the county in which the mortgaged premises are situated, who shall immediately affix the same in a book prepared and kept by him for that purpose; and who shall also enter in said book, at the bottom of such notice, the time of receiving and affixing the same, duly subscribed by said clerk, and shall index such notice to the name of the

"mortgagor, for which service the clerk shall "be entitled to a fee] of twenty-five cents.

"(3.) By serving a copy of such notice at "least fourteen days prior to the time therein "specified for the sale, upon the mortgagor or "his personal representatives, and upon the "subsequent grantees and mortgagees of the "premises, whose conveyance and mortgage "shall be upon record at the time of the first "publication of the notice, and upon all per- "sons having a lien by or under a judgment or "decree upon the mortgaged premises, subse- "quent to such mortgage, personally, or by "leaving the same at their dwelling-house in "charge of some person of suitable age, or by "serving a copy of such notice upon said per- "sons at least twenty-eight days prior to the "time therein specified for the sale, by depos- "iting the same in the post office, properly "folded and directed to the said persons at "their respective places of residence."

It is not pretended, on the part of the defendant, that proceedings in conformity with these requirements were taken to foreclose the equity of redemption of this complainant.

The advertisement in an obscure newspaper, "The Brooklyn Standard," once or twice a week for six weeks (see transcript of record, page 14, folio 46), so far from complying with the terms of the deed, manifestly shows that those who caused that advertisement to be inserted believed that the provisions of the New York Revised Statutes, on the subject of foreclosure of mortgages, were within the intendment of the Court that made the decree. But the defendant does not claim that a legal foreclosure was had. Their advertisement was entirely nugatory. It did not furnish constructive notice to the party holding the

equity of redemption; the fact, as shown by the complainant's bill, and not controverted (transcript of record, page 7, folio 23), is that there was no actual notice.

(*b.*) The trustee under the trust deed was, by the provisions of the decree, and of the trust deed, directed to give such reasonable notice as is usual or provided by law in the State of New York (see transcript of record, page 33, folio 109, also page 37, folio 121.) The notice given by Mr. Noble, with reference to this clause, is not usual in New York, nor is there any provision of law in New York, requiring or directing such an advertisement as was made on behalf of the trustee.

The word "*usual*" can have no effect, unless it be regarded as identical with the term "*provided by law.*" The law of New York, to which reference is made, prescribes no notice of sale of lands under an express trust, naturally presuming that since the trust is created by agreement, the instrument originating it will contain provisions concerning its execution; and in the absence of such provisions a sale, public or private, with or without notice, is valid. And in the case of mortgages, no notice is usual, except that prescribed by the various New York statutes regulating the foreclosure of mortgages; since the equity of redemption of the mortgagor still continues any other notice is useless. There is, then, in New York, no notice *usual*, except that *provided by law.* The intention of the Court can, therefore, be best construed by interpreting the phrase "*usual* OR *provided by law*" to mean "*usual* AND *provided by law,*" as that is the only interpretation that can be given, unless the word "usual" is entirely rejected, and it is always

the province of Courts to give meaning to all the words of an instrument.

Atty. General *vs.* Plank Road Company, 2 Mich. 138.
Palmer *vs.* Stumph, 29 Indiana, 329, 333.
Opinion of the Justices, Massachusetts Supreme Court, 22 Pickering, 571.

And Courts do not hesitate to construe the disjunctive "or" to have the same meaning as the copulative "and," and *vice versa*, in order to effectuate the evident intent of the parties

Maxwell on the Interpretation of Statutes, page 216.
Fowler *v.* Padget, 7 T. R. 509.
Potter's Dwarris on Statutes and Construction, pages 286 and 292.
Roome *v.* Phillips, 24 New York, 463.
Arnold *v.* Buffum, 2 Mason, 208, 222, 226.

(*c.*) Trustees are bound to comply strictly with the requirements of the instrument originating and defining their power and authority.

1 Hilliard on Mortgages, 4th ed. 143.
Hill on Trustees, 474, 2d Am. ed.
Thornton *v.* Boyden, 32 Ill. 200.
Hull *v.* Towne, 45 Ill. 493.
Griffin *v.* Marine Co., 52 Ill. 130.
Jencks *v.* Alexander, 11 Paige, 619.
Tarascon *v.* Ormsby, 3 Litt. (Ky,) 404.
Wallis *v.* Thornton, 2 Brocken, 422.
Strother *v.* Law, 54 Ill. 413.
Gray *v.* Shaw, 14 Mo. 341.
Smith *v.* Proven, 4 Allen, 516.
Roche *v.* Farnsworth, 106 Mass. 509.

In Wallis *v.* Thornton (*supra*), Chief Justice Marshall, speaking of an instrument, connected with a transaction, remarkably like that under consideration, says: "A trustee has no power which the deed does not expressly give."

(*d.*) Courts of equity are adverse to, and have ever been suspicious of, sales under power of sale mortgages or trust deeds, without notice to the mortgagor; and with extreme reluctance have, in some few cases, under peculiar circumstances, upheld such sales; and special requirements of notice in the deed itself, or the instrument originating the trust, have been enforced with the utmost rigor.

Anonymous, 6 Madd. Ch. 10.
Gill *v.* Newton, 12 Jurist (N. S.) 220.
Major *v.* Ward, 5 Hare, 598.
Longwith *v.* Butler, 3 Gilman (Ill.), 32.
Tarascon v. Ormsby, 3 Littell (Ky.) 404.
Flower *v.* Elwood, 66 Illinois, 438
Bigler *v.* Waller, 14 Wallace, 297.

In the anonymous case in Maddock (*supra*), an injunction was granted, restraining a person occupying the position of a trustee for sale, from proceeding precipitately without notice to the mortgagor of the intention of the trustee to sell, it being his duty to attend to the interests of both *cestuis que trustent*, the mortgagor and mortgagee.

D. Since the terms of the trust deed were not strictly complied with, and no proceedings were had amounting to a legal foreclosure of the equity of redemption of Mr. Shillaber in the New York lands, the only effect of the sale of the said lands to defendant John Robinson,

through John A. Robinson, was to revest John Robinson with the same title which he held previous to the execution of the "trust deed." The proceeding under the trust deed, by reason of non-compliance with the prescribed provisions of the trust deed and decree, and consequent non-execution, were nugatory, and left the parties in the same plight as prior to those proceedings. Robinson still remains mortgagee, subject to all the disabilities and invested with all the rights of a mortgagee in possession.

Willard Eq., Juris., 608 and cases.
Murray *v.* Ballou, 1 Johns. Ch. 574.
Gilchrist *v.* Stevenson, 9 Barb., Sup. Ct. 9.
Bigler *v.* Waller, 14 Wallace, 297.

E. If Robinson were still in possession of the lands in question, there can be no doubt that the complainant would be entitled to a conveyance thereof, upon payment to the defendant of whatever sum of money still remained due him under the decree of the Illinois Court, and the same result would follow if the said lands had been conveyed to, and were now in the possession of, parties having notice of the complainant's rights in the premises.

Willard, Eq., Juris., 608.
Shepherd *v.* McEvers, 4 Johns, Ch. 136.
Bloom *v.* Van Renssalaer, 15 Ill., 503.
Story, Eq., Juris., § 1027.
Montague *v.* Dawes, 12 Allen. Mass., 397.
S. C. 14 Id., 369.

F. But the defendant, Robinson, has fraudulently concealed from all the world, the title which he now claims to have acquired to

the said lands under the said decree, (see transcript of record, page 7, folio 23), and he has sold them under his original title thereto, (see transcript of record, page 14, folio 44), without any regard to the proceedings had in Illinois, to parties ignorant of the complainant's equitable rights therein. The trust deed made by the defendants to Noble, and the deed of Noble to John A. Robinson, have never been recorded in either of the counties in the State of New York, Kings, Essex or Sullivan, where the lands in question are situated, (see transcript of record, page 7, folio 23). The notice of sale by Noble was published as privately as possible in an obscure newspaper in Kings county, (see transcript of record, page 14, folio 46). The expenses of the proceedings were defrayed entirely by the defendant, for it appears by his answer that he paid Noble no part of the purchase money, *except by crediting him therefor on account of the sum payable to the defendant under the said decree*, (transcript of record, page 14, folio 45). He did not purchase at said sale from Noble in his own name, but in the name of one John A. Robinson, who he admits purchased the lands in question for him, (transcript of record, page 13, folio 42); and who has never conveyed them to him, and the deed of Noble to John A. Robinson has not been recorded.

This course of proceeeding shows, beyond peradventure, that Mr. Robinson has taken two inconsistent positions in regard to the lands in New York. In Illinois he would insist that they are, after the rendering of the decree, no longer his; in New York he would maintain, and in action he has done so, that the Illinois proceedings were of no avail. The lands in Flatbush and in Sullivan and Essex counties were still his, notwithstanding the decree of the Western

Court had conveyed them directly to this complainant! By not recording the deeds made in pursuance of the decree, he relieved subsequent purchasers, without actual notice, from all liability. To interpret the rights of the defendant, in accordance with the view adopted by him herein, the title is in John A. Robinson.

These facts, together with the gross inadequacy of the sums for which the said lands are alleged to have been purchased by the defendant at such sale, fully sustain the charges in the bill, of a fraudulent connivance between the defendant and Noble to defeat the provisions of the Illinois decree in favor of this complainant, and are alone sufficient to render the defendant accountable to this complainant for all moneys which he received upon the subsequent sales by him of the lands in question, with interest thereon from the dates when they were respectively made.

Story, Eq. Juris., §§ 1,015, 1,016.
Willard, Eq. Juris., p. 607.
Bispham's Princ. of Eq., § 157, and cases.
Snell's Princ. of Eq., p. 250, *et seq.*

And indeed, under these circumstances, the defendant is chargeable not only with the moneys which he so received, but also with all additional sums which the premises may be reasonably worth at the present day. Having kept the mortgagor out of possession, he is bound to see into whose hands they go, and if the mortgagor is subsequently entitled to recover possession, it is but just and equitable that he should have it at its present worth, or if, as in this case, the mortgagee has parted with the possession in favor of an innocent

third party, he (the mortgagor) should have the equivalent of its present worth.

Snell's Principles of Equity, p. 250.

G. But it is not necessary to make out a case of fraudulent connivance between Noble and the defendant in order to entitle this complainant to the account which he desires. It is sufficient that the defendant is a mortgagee in possession of the lands. His position is that of a trustee for this complainant, and bound as such to take the greatest care of the interests of the latter, and when called on for an accounting, to show that he has performed the duties of a faithful trustee, in relation t the mortgaged property.

Story's Eq. Juris., § 1016.
Bigler *vs.* Waller, 14 Wallace, 297.
Russell *vs.* Southard, 12 Howard, 139, 154.

H. If, as is claimed by the answer of the defendant, the deed from the defendant Robinson to Noble was not in the nature of a mortgage, but created a valid trust under the New York Statutes for the sale of the said land for the payment of the balance found due by the decree to Robinson, what is the object or effect of the provisions of the decree and, indeed, of the trust deed itself, which annex to the power of sale in Noble the *condition* that such sale shall be made in such manner, and after giving such reasonable notice of the time and place of sale, as is usual or provided by law in the State of New York. The New York Statutes authorizing the creation of trusts for the payment of debts are utterly silent as to the manner in which such sales may be made (New York Revised Statutes, Part II., ch. 1, art. 2., "Of Uses and Trusts,") leav-

ing such matters to be settled by the agreement of the parties in the creation of the trusts, and, in the absence of contrary directions, the sale may be public or private, and with or without notice, in the discretion of the trustee, subjected as he is to the control of Courts of Equity, in accordance with the fundamental principles of equity jurisprudence.

If, then, this view be taken, the provisions concerning notice of time and place of sale of the New York lands embraced within the decree of the Illinois Court and of the trust deed are nugatory and superfluous. On the other hand, considering the whole transaction, as all the circumstances and and the express terms of the decree show it was intended to be considered, as a mortgage with a power of sale in a third party, in this case Noble, those provisions have full effect. Notice is necessary in this case, and the New York Statutes are clear and explicit in regard to such notice. The presumption certainly is that these words are to have an effect.

Second.

The decree must be construed so as to ensure to Robinson a security or lien for the payment of the balance found due him, and a mode of foreclosing it, without *unnecessary* prejudice to the rights of the complainant. This was a proceeding *in invitum*, this complainant at the time the decree was made being neither present nor represented by counsel. Equity requires that the construction of the proceedings most favorable to all parties, with out prejudicing the rights of the others, shall be had.

By the construction claimed by the defendant, if it be the correct one, Robinson has been

enabled, without any notice to this complainant, to purchase the whole of these lands for less than one-third of the price at which they are valued in the contract of sale, and for about the same sum for which within ten months thereafter he sold a single section of the said Flatbush lands. The final result of the intended adjustment of the *equities* between the parties being that this complainant has been compelled to convey to the defendant Robinson about 1,730 acres of land in the State of Illinois, of the value of nearly $12,000; has received nothing whatever therefor, Robinson, through the intervention of a Court of *equity*, retaining possession of the New York lands, and in addition to this, Shillaber finds himself indebted to Robinson in the sum of over $2,000, with interest thereon from the 16th day of March, 1861. That equity would work such a hardship is, beyond all question, contrary to principle and authority, opposed to all notion of right and justice.

By the construction which the complainant claims this entire transaction is in the nature of a mortgage, the complainant's equity of redemption, the same not being foreclosed in the manner prescribed by the instrument creating the lien, and authorizing its enforcement, is preserved and still vested in him, together with a right to a legal notice of proceedings to foreclose the same, and beyond a little longer delay in the receipt of his money, Robinson is not prejudiced thereby in the slightest degree. This construction gives effect to all the provisions of the decree, is an equitable adjustment of the rights of the parties, and is most consonant with right and justice.

Third.

Even if the deed which was made by the defendant Robinson to Noble in pursuance of the terms of the decree be regarded as a strict trust deed, as creating an express trust under the New York Statutes for the sale of of land, Robinson was not authorized by the said decree to become the purchaser at any such sale, and in the absence of an express permission by the instrument originating the alleged trust, he could not, *under the circumstances of this case*, acquire the title to said lands by such a sale, directly or indirectly.

Michoud *v.* Girod, 4 How. U. S. 503.
Berger *v.* Bennet, 1 Caine's Cases in Error, 11, 13, 20.
Dyer *v.* Shurtleff, 112 Mass. 165.
Ex parte Hughes, 6 Vesey, 617.
Ex parte Bennett, 10 Vesey, 381.
Coles *v.* Trecothick, 9 Ves. 234.
Parmenter *v.* Walker, 9 R. I. 225.
Washburn on Real Property, vol. 2, p. 79 (4th ed., 1876.)
Davoue *v.* Fanning, 2 Johnson Ch. 252.
Story's Eq. Juris., § 1057 (note 3), 12th ed.
Montague *v.* Dawes, 12 Allen, 397.
S. C., 14 Id. 369.
Benham *v.* Rowe, 2 Cal. 386.
Lockett *v.* Hill, 1 Wood's U. S. Circuit, 552.
Dexter *v.* Shepard, 117 Mass. 480.
Sugden on Vendors and Purchasers, chapter xx, § II. ¶ I.

This rule embraces trustees, mortgagees or any other person occupying a fiduciary capacity, their agents or their assignees.

Hill on Trustees, 159, 160.
Mapps *v.* Sharp, 32 Ill, 13.
Waite *v.* Dennison, 51 Ill, 319.

In a few cases Courts have held that the sales so made were valid, but only when a marked spirit of fairness pervades the entire transaction and due care is taken to preserve the right of all interested.

Coles *v.* Trecothick, 9 Vesey, 234.
Howard *v.* Davis, 6 Texas, 174.

But so careful are the Courts to safely guard the interest of beneficiaries that in almost all cases found in the books, where ever any attempt to act unfairly, to stifle competition, or in any manner to take undue advantage of the fiduciary, such sales have been set aside, provided innocent third parties would not suffer thereby.

Longwith *v.* Butler, 3 Gilman, 32.
Griffin *v.* Marine Co., 52 Ill, 130.
Sugden on Vendor and Purchasers.
chapt. 20 § II. ¶ I.
Flower *v.* Elwood, 66 Ill, 436, 449.

Mr. Washburn in his valuable work on real property, (*ut supra*) speaking of a trust deed in form precisely like the one in question, says: "It has been generally held that he" (*i. e.* the trustee, a third person) "cannot become a purchaser of the estate, and whether the creditor in whose favor the trust has been created can become a purchaser at a sale thereof, at auction or not, has been variously held, depending upon whether in making such sale the trustee asked independently of any control or direction of the creditor, as well as fairly, or whether the creditor had the power to control the sale" (page 81).

This language is aptly suited to the case in question. The defendant, Robinson, is the *creditor* for whose benefit the entire matter was set on foot; the complainant, Shillaber being the *debtor* under the decree of the Western

Court, and Noble, the *trustee* to sell. The facts, as charged in the complainant's bill, and not controverted by the defendant's answer, show that the defendant controlled the sale, that he paid the expenses of the sale; while the grossly inadequate price for which the lands were sold; and the facts that Robinson procured the purchase to be made in another name, that the deeds were never recorded in the State of New York where the real estate is situated, and subsequently sold the said lands without regard to his alleged title under which he now claims, all show that the proceedings were not carried on in a spirit of fairness, and that no regard was had for the interests of the complainant.

The rule as laid down by Sugden (*ut supra*) is as follows:

> "It may be laid down as a general proposition "that trustees who have accepted the trusts, un- "less they are nominally such, as trustees, to "preserve contingent remainders, agents, com- "missioners of bankrupts, assignees of bank- "rupts or of insolvents, whilst the distinction re- "mained, or their partners in business, solicitors "to the commission, auctioneers, *creditors who "have been consulted as to the mode of sale*, "counsel, or any persons who, by being employ- "ed or concerned in the affairs of another, have "acquired a knowledge of his property, are "incapable of purchasing such property them- "selves, except under the restrictions which will "shortly be mentioned. For if persons having "a confidential character were permitted to avail "themselves of any knowledge acquired in that "capacity, they might be induced to conceal "their information, and not to exercise it for the "benefit of the persons relying on their integ- "rity. The characters are inconsistent."
>
> Sugden on Vendors and Purchasers, chap. 20., § 2. par. 1.

Courts of equity are very jealous of guarding the equity and redemption of mortgagors and slight evidence of circumstances tending to show that undue influence has been used, or any unjust advantage taken to induce the mortgagor to part with his equity of redemption has been deemed sufficient to relieve him from any hardship caused thereby.

2 Washburn on Real Property (4th ed.), page 62.
Bispham's Principles of Equity, § 153.
Newcomb *v.* Bonham, 1 Vernon, 7.
Johnston *v.* Gray, 16 Sergeant and Rawle, 361.
Waters *v.* Randall, 6 Metcalf, 479.
Villa *v.* Rodriguez, 12 Wallace, 323.

The language of Mr. Justice Swayne in Villa *v.* Rodriguez (at page 339) is peculiarly appropriate, and may serve as a safe guide in construing like instruments.

"The law upon the subject of the right to
" redeem where the mortgagor has conveyed
" to the mortgagee the equity of redemption,
" is well settled. It is characterized by a
" zealous and salutary policy. Principles al-
" most as stern are applied as those which
" govern where a sale by a *cestui que trust* to
" his trustee is drawn in question. To give
" validity to such a sale by a mortgagor, it
" must be shown that the conduct of the
" mortgagee was, in all things, fair and frank,
" and that he paid for the property what it
" was worth. He must hold out no delusive
" hopes; he must exercise no undue influence;
" he must take no advantage of the fears or
" poverty of the other party. Any indirection
" or obliquity of conduct is fatal to his title.
" Every doubt will be resolved against him.
" Where confidential relations and the means

" of oppression exist, the scrutiny is severer
" than in cases of a different character. The
" form of the instruments employed is immate-
" rial. That the mortgagor knowingly sur-
" rendered, and never intended to reclaim, is
" of no consequence. If there is vice in the
" transaction, the law, while it will secure to
" the mortgagee his debt, with interest, will
" compel him to give back that which he has
" taken with unclean hands. Public policy,
" sound morals, and the protection due to
" those whose property is thus involved, re-
" quire that such should be the law."

Fourth.

(1.) It is submitted that the learned Judge in the Court below was in error when he stated that the sole question arises upon the effect of the trust deed to Noble (see Transcript of record, page 45, folio 143). He appears to have overlooked the importance of regarding the trust deed as ancillary to the decree, and to have considered the positions of the complainant and defendant, as determined by that deed alone.

The deed from the defendant, Robinson, to Noble, by reference, included within its terms the provisions of the decree (see trust deed, Transcript of Record, page 37, folio 120), where the words of the instrument are as explicit as could be desired for that purpose, and so incorporated within it the decree, stating that it was executed *in obedience to and conformity with said decree, and to carry out the requirements and provisions thereof.*

The decree, then, should be regarded as the principal, the trust deed, as subordinate, and the latter in all its provisions should be governed in all respects by the former. What effect would the trust deed have as it stands, were it not for the fact

that the decree gives it vitality? If the decree, then, causes the deed to operate, it is but proper that this operation should be guided by the object, provisions, and intent of the decree.

Another evidence contained within the trust deed, of the fact that this deed was to be treated as subordinate to the decree, may be seen in the directions given therein to the trustee concerning the disposition of the proceeds. After providing for the payment of the expenses, and the satisfaction of the claim of the defendant, Robinson, if any balance remains, the trustee is directed "*to hold the same subject to the "further order of the Circuit Court, in and for "Rock Island County in the State of Illinois,*" to be disposed of for the benefit of this complainant (Transcript of Record, page 37, folio 122).

(2.) Mr Justice Hunt, it is submitted, again erred when he remarked that had the conveyance been in form to Shillaber upon the settlement, the strongest equity in favor of the complainant had been assumed (Transcript of Record, page 45, folio 144). Had this been done as stated, and Mr. Shillaber thereupon conveyed to Noble, upon a like trust to that contained in the deed from the defendant to Noble, the equities of this complainant would be entirely gone.

The *lien* or *security* afforded to the defendant by the decree of the Illinois Court would then become *executed*, instead of, as now, *executory*, and the "deed of trust" therein provided would be altered from a *means* of carrying into effect the object of that decree into that *effect* itself. Hence, there would exist some reason for confining the consideration of the relative rights of the parties to the trust deed, and shutting out the decree, whereas, under the proceedings, as they in reality were had, those rights could only be ascertained and determined by regarding those proceedings as an entirety. Had the complainant himself made the deed to Noble, he could have limited and disposed of his

equity of redemption with greater facility than could be done in a proceeding *in invitum*, as this is; and then Mr. Shillaber being a party to the instrument, it could be construed with far greater force against him Whether or not it would be an equitable mortgage, would depend on the then necessarily varied positions of the parties. Mr. Shillaber being the grantor in the deed would occupy, in law, the position now held by the defendant and the deed being created, as of necessity it would be, for the benefit of Robinson, the *cestui que trust* —a valid express trust under the New York law, might then be created. The supposition of the learned justice, therefore, makes no concession in favor of this complainant; but, on the contrary, the occurrence of such a state of facts as he suggests would operate rather to the benefit of the defendant.

Fifth.

In the account so to be taken, the defendant will, of course, be allowed to offset whatever sum of money is due him by the complainant, under the said Illinois decree, but there is a palpable error in the account stated by the said decree, the correction of which will reduce the balance found by said decree against this complainant from the sum of $4,249.58 to the sum of $880.58, and this correction should be made.

A. The error in question arose in this way: The Illinois decree was made about eight years after the date of the contract, which it adjudged should be specifically performed by this complainant, (see Transcript of Record, page 27, folio 86, also page 34. folio 113.) The entire rents and profits, during that period, of the lands in Illinois, which this complainant

is directed to convey to Robinson, are allowed to the latter, (see Transcript of Record, page 29, folio 92) and, as a matter of course, the interest for the same period on the contract price of these lands should have been allowed to this complainant, but by an ingeneous wording of the decree (at the settlement of which it is admitted that this complainant was neither present or represented by counsel) this complainant is only allowed interest on a portion of said contract price, viz., on the sum of $4,695.32, (see Transcript of Record, page 29, folio 92), whereas the whole contract price, as stated in said decree, amounts to the sum of $11,695.32, (see Transcript of Record, page 29, folio 91), leaving the sum of $7,000, the interest on which, for the above mentioned period, amounts to $3,360, which being deducted from the apparent balance $4,249.58 against this complainant, as found by said decree, leaves the sum of $880.58, which is the real balance then due,

B. There is no reason whatever why this complainant should have been allowed interest on a portion of the contract price of the Illinois lands, which he is directed to convey to Robinson and not on the whole, and it cannot therefore be presumed that such a result was intended by the Court which made the decree in question.

It was either caused by a mere clerical error, or by a fraudulent design on the part of those who drew the decree, and in either case the error should be corrected.

1 Story's Eq. Jur. § 523.

Sixth.

As to the objection that Noble is a necessary party to this suit, it suffices to say:

1st. It appears by the bill that the said Noble is a non-resident of this State, and cannot be found therein. (See Transcript of Record, page 8, folio 25.)

See 22d Equity Rule.

2nd. The only object in making Noble a party to the Illinois suit after the death of John Shillabe, was to enable Robinson to enforce against him as administrator of the personal estate of said John Shillaber any *personal* judgment which Robinson might have obtained in that suit, and as the result shows, he was not a necessary party even for that purpose—the balance found due to Robinson in that suit being much less than the value of the lands in this State, which he had contracted to convey to said John Shillaber. It is true that Noble was by the decree in that suit made a trustee to sell those lands for the payment of such balance, but he was to bring the surplus into Court (see Transcript of Record, page 5, folio 16), and there can be no doubt that such surplus would have belonged to the complainant in this suit as the heir-at-law of the said John Shillaber, and not to Noble as administrator of his estate. The duties of this trust might as well have been imposed on the clerk of the Court, or any other suitable person, as on Noble. If Noble were made a party, and within the jurisdiction of the Court, he would be joined merely as a matter of form, for the sake of conformity in the bill, and this Court will not allow its jurisdiction to be ousted by reason of his non-joinder.

Wormley *v.* Wormley, 8 Wheaton, 421.

In this case, Mr. Justice Story speaks as follows:

"This Court will not suffer its jurisdiction "to be ousted by the joinder or non-joinder of

"formal parties, but will rather proceed with-
"out them, and decide upon the merits of the
"case between the parties, who have the real
"interests before it, whenever it can be done
"without prejudice to the rights of others;"

3d. Noble is not a necessary party to the accounting prayed for in this suit; the moneys of which we seek an account were received wholly by Robinson, and appropriated by him to his own use.

4th. Nor has Robinson any interest in having Noble made a party in this suit. He does not claim that he paid Noble any money as trustee under the Illinois decree, or upon the sale which was made by Noble to him, of the said New York lands, and if as we claim, he connived with Noble in a fraudulent intent to defeat the provisions of said decree, in favor of this complainant he is clearly within the rule, that where several trustees, unite in a breach of trust, the cestui que trust may proceed against all or either of them.

Gilchrist *vs.* Stevenson, 9 Barb. S. C. R., p. 9.

Seventh.

The decree of the Circuit Court should be reversed, and this Court should declare that the complainant is entitled to receive as follows:

(1.) The aggregate amounts for which the New York lands were sold by the defendant, $9,628 (transcript of record, page 14, folio 44), with interest on the same from the respective dates of sale to the date of its decree, less the amount *actually* due by complainant to defendant at the date of the Illinois decree,

$880.58, with interest to the same time, *i. e.*, provided this Court is of the opinion that the apparent error on the face of the decree can be corrected.

(2.) If, however, the Court concludes that this manifest error cannot be corrected, the statement should be as follows: The aggregate amounts for which the New York lands were sold by the defendant, $9,628, with interest on the same from the respective dates of sale to the date of its decree, less the amount found due by complainant to defendant by the Illinois decree, $4,249.58 (see transcript of record, page 31, folio 100), with interest to the date of the decree.

MICHAEL H. CARDOZO,
of Counsel for Appellant.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1877.

No. 25.

THEODORE SHILLABER,

Complainant and Appellant,

versus

JOHN ROBINSON,

Defendant and Appellee.

Brief in behalf of Appellant on re-argument of Appeal from the Circuit Court of the United States for the Eastern District of New York.

MICHAEL H. CARDOZO,

Of Counsel for the Appellant.

NEW YORK:
MORRISON & NATHAN, 23 Dey Street.
1878.

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Defendant and Appellee.

Brief in behalf of Appellant on re-argument of Appeal.

No. 25.
October Term, 1877.

STATEMENT OF FACTS.

On the 12th October, 1852, a written contract was made between John Shillaber, the father of this complainant, and the defendant, John Robinson, which is substantially set out in the bill in this suit. (See Transcript of Record, pages 1 and 2, folios 1 to 7; also pages 34 to 36, folios 113 to 117.)

By this instrument the said John Shillaber agreed to sell to the said Robinson about four thousand acres of land, in the State of Illinois, at the rate of $6\frac{15}{100}$ per acre, making in all the sum of $27,000\frac{00}{100}$. (See Transcript of Record, pages 1 and 2, folios 4 and 5; also page 34, folio 113.)

In part payment of this sum Robinson agreed to convey to the said John Shillaber three sections or lots of land situate upon Clarkson street, in the village of Flatbush, in Kings county, in the State of New York, at the stipulated price of $3,000\frac{00}{100}$; and about four hundred and ninety-four acres of land in Sullivan and Essex counties, in the State of New York, at the stipu-

lated price of $4,000$\frac{00}{100}$, in all $7,000$\frac{00}{100}$. (Transcript, p. 2, fols. 5 and 6; also p. 35, fols. 114 and 115.)

The deeds of conveyance of the lands so purchased by the said Robinson and of those so to be conveyed by him in part payment therefore, were to be executed with all reasonable dispatch, and were to be sufficient in the law to convey good and indefeasible titles in fee simple, free from all incumbrances, to the parties respectively entitled thereto. (Transcript, p. 2, f. 6; also p. 35, f. 115.)

For some reason, which does not expressly appear, the said John Shillaber refused to perform this contract, and a suit was commenced against him by Robinson in the Court of Chancery of the State of Illinois, to enforce a specific performance thereof. (Transcript, pp. 2 and 3, f. 7.)

During the pendency of this suit, and before any hearing in the same was had, the said John Shillaber, who had duly appeared therein, died, and the suit was afterwards revived by making parties thereto the complainant in this suit, who was the only heir-at-law of the said John Shillaber, and one Silas Noble, to whom letters of administration of the estate of said John Shillaber had been duly granted by the County Court of Ogle county, in the State of Illinois. (Transcript, pp. 2 and 3, f. 7.)

In October, 1855, an interlocutory decree (Transcript, p. 3, fols. 7 and 8; see also, pp. 23 to 26, fols. 75 to 84,) was made in said suit, by which it was adjudged that the said John Shillaber, and this complainant, as his heir-at-law, had unreasonably refused to perform the said contract of sale, and that there ought to be a specific performance thereof. (Transcript, p. 3, fols. 7 and 8; also p. 24, fols. 76 and 77.)

That the said Robinson should convey to this complainant the said lots and tracts of land in the State of New York (Transcript, p. 24, f. 77), and that upon the execution and delivery of such conveyance, and the payment of the residue of the purchase price of the said lands in the State of Illinois, this complainant should

convey the same to the said Robinson (Transcript, pp. 24 and 25, f. 78); and it was further ordered by the said interlocutory decree, that the cause should be referred to Joseph Lewis, as a special master of the Court, to take further testimony therein, and hear the further proofs and allegations of the parties, and that he should report his doings therein to a subsequent term of the Court. (Transcript, p. 3, f. 8; also pp. 25 and 26, f. 81.)

On 10th September, 1860, a final decree (Transcript, pp. 27 to 35, fols. 85 to 111) was made and entered in said suit, at a Circuit Court, sitting as a Court of Chancery, in and for the county of Rock Island, in the State of Illinois, which decree was enrolled, and is still in full force and effect. (Transcript, pp. 3 to 6, fols. 8 to 15.)

At the time this decree was settled and entered, this complainant was absent from the State of Illinois, and was not represented by solicitor or counsel, being unable, from pecuniary embarrassments, to obtain and pay for legal services in the matter. (Transcript, p. 6, fols. 19 and 20.)

By this decree it was adjudged that this complainant, as heir-at-law of said John Shillaber, could make title, at that time, to but one thousand seven hundred and thirty acres, or thereabout, of the Illinois lands described in said contract of sale, which amounted in value, at the contract price of $\$6.\frac{75}{100}$ per acre, to the sum of $\$11,695.\frac{32}{100}$. (Transcript, p. 3, f. 9; also p. 29, f. 91), and an account was stated by the said decree between this complainant, as such heir-at-law, and the said Robinson, in which this complainant is credited with the said sum of $\$11,695.\frac{32}{100}$, and is charged with the sum of $\$7,000.\frac{00}{100}$, the stipulated price of the New York lands (which by the said interlocutory decree had been directed to be conveyed by said Robinson to this complainant,) (Transcript, p. 3, f. 8; also p. 24, f. 77), leaving a balance in favor of this complainant of $\$4,695.\frac{32}{100}$. (Transcript, p. 3 f. 10; also p. 29, f. 92.) Interest was allowed to this complainant upon this balance (*but by a singular inconsistency, not upon the remain-*

der of the said sum of $11,695.$\frac{33}{100}$) from the date of the said contract to the date of the said decree. (Transcript, p. 3, f. 10; also p. 29, f. 93.) On the other hand, Robinson was credited in the said account with the *entire* rents and profits of the said Illinois lands, from the date of said contract to the date of said decree, and with other large sums of money for incumbrances thereon and damage thereto, amounting in the whole to the sum of $11,181.$\frac{43}{100}$, and the result of the account, so stated, was to leave this complainant indebted to the said Robinson in the sum of $4,249.$\frac{58}{100}$. (Transcript, pp. 4 and 5, f. 11 to 14; also pp. 29 to 31, f. 93 to 100.)

The decree provides for the conveyance to Robinson of the said Illinois lands in fee simple, free from all incumbrances, (Transcript, p. 24, f. 78,) but declares that Robinson ought not in equity and good conscience to be required to convey to this complainant the said New York lands, without some *security or lien* upon the same for the payment to him of the said sum of $4,249.$\frac{58}{100}$, (Transcript, p. 31, f. 101,) and that the same ought to be paid to him in a reasonable time, or that he be *permitted to enforce the payment of the same from and out of said lands, and have the same sold for that purpose*, (Transcript, p. 31, f. 101,) and it was thereupon further adjudged, by the said decree, that Robinson should execute to this complainant, and deposit with the clerk of said Court, a good and sufficient deed of conveyance, under the laws of the State of New York, of such lands, to be held by said clerk in escrow for ninety days from the date of the said decree, and to be delivered by him to this complainant upon payment of the said sum of $4,249.$\frac{58}{100}$, and interest. (Transcript, pp. 4 and 5, f. 13; also p. 32, fols. 105 and 106.)

But that in default of such payment within that time, the said conveyance should be returned by said clerk to the said Robinson, who should thereupon and at the same time execute and deliver to the said Silas Noble a *trust deed*, for said New York lands, in terms that the said Noble should proceed to sell

the same in *such manner and after giving such reasonable notice of the time and place of sale as might be usual or provided by law in the State of New York*, and should execute and deliver to the purchaser or purchasers thereof good and sufficient legal titles for the same, and out of the proceeds of such sale, should pay, first, the expenses of such trust, and afterwards the said sum of $4,249.$\frac{88}{100}$, and interest, and should hold the balance subject to the further order of said Court (Transcript, pp. 5 and 6, fols. 15 to 17; also pp. 33 and 34, fols. 109 and 110.)

In compliance with the requirements of the said decree a proper deed of conveyance of the said New York lands was executed by Robinson and his wife to this complainant, and deposited with the clerk of said Court. (Transcript, p. 7, fols. 20 and 21.)

No part of the said sum of $4,249.$\frac{88}{100}$ was ever paid, and at the expiration of ninety days from the date of the said decree such deed was delivered back by the Clerk to Robinson, who thereupon, and at the same time, together with his wife, executed and delivered to the said Silas Noble a trust deed, so-called, of the said New York lands, a copy whereof is annexed to the defendant's answer, marked A. (Transcript, p. 7, fols. 21 and 22; also p. 13, fols. 40 and 41; also pp. 15 to 17, fols. 49 to 54.)

In the early part of the year 1861 a notice of the sale of the said lands, of which a copy is also annexed to the defendant's answer, was published in the *Brooklyn Standard*, a newspaper published in the City of Brooklyn, in Kings County, State of New York. (Transcript, p. 14, f. 46; also p. 21, f. 65.) This notice was so published once or twice a week for six weeks immediately previous to the 16th of March, 1861, on which day a sale of all the said lands was made by said Noble to one John A. Robinson, (Transcript, p. 13, f. 45), *who purchased the same for the defendant*, John Robinson, for the sum of $1,950.$\frac{00}{100}$, (Transcript, p. 13, f. 42), being $1,500.$\frac{00}{100}$ for the said lots in Flatbush, Kings County, and $494.$\frac{00}{100}$ for the

der of the said sum of $11,695.$\frac{33}{100}$) from the date of the said contract to the date of the said decree. (Transcript, p. 3, f. 10; also p. 29, f. 93.) On the other hand, Robinson was credited in the said account with the *entire* rents and profits of the said Illinois lands, from the date of said contract to the date of said decree, and with other large sums of money for incumbrances thereon and damage thereto, amounting in the whole to the sum of $11,181.$\frac{43}{100}$, and the result of the account, so stated, was to leave this complainant indebted to the said Robinson in the sum of $4,249.$\frac{58}{100}$. (Transcript, pp. 4 and 5, f. 11 to 14; also pp. 29 to 31, f. 93 to 100.)

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said lands in Sullivan and Essex counties, and thereupon the said Noble made and executed to the said John A. Robinson, two several deeds of the said lands, copies whereof are also annexed to the defendant's answer. (Transcript, p. 14, f. 45; also pp. 19 to 20, fols. 60 to 63). *No part of the purchase money for said lands was ever paid by the defendant Robinson to the said Noble, except by crediting him therefor on account of the sum payable to the said Robinson under the said decree.* (Transcript, p. 14, f. 45). Neither the said trust deed nor either of said deeds from Noble to the said John A. Robinson has ever been recorded in either the counties of Kings, Sullivan, or Essex, in the State of New York (Transcript, p. 7, f. 23), and the defendant Robinson, subsequently to the said 16th day of March, 1861, sold and conveyed to divers persons, neither of whom had any knowledge or notice of the said contract of sale, or of the said decree, the whole of the said New York lands, as follows: Section 13 of said Flatbush lands on December 18, 1861, to one Thomas Rice, for $1,805.$\frac{00}{100}$; Section No. 14, and part of Section No. 15, of said lands on November 1st, 1867, to one Robert Stewart, for $4,000.$\frac{00}{100}$; and the remainder of Section No. 15, of said Flatbush lands on November 30th, 1868, to one Philip S. Crooke, for $2,000.$\frac{00}{100}$; the said lands in Sullivan County on the 7th day of June, 1865, to Elizabeth Clarke, for $1,200.$\frac{00}{100}$; and the said lands in Essex County on the 28th day of January, 1863, to John Clarke, for $623.$\frac{75}{100}$, and duly received the said sums of money at the respective dates above-mentioned, and has appropriated the same to his own use. (Transcript, p. 14, fols. 44 to 45). This complainant had no notice of the proceedings of the said Noble, under the said decree for the sale of the said New York lands, and no other proceeding to foreclose the complainant's equity of redemption in the said lands, or any part thereof, has ever been taken by the said Noble or any other person. (Transcript, pp. 7 and 8, f. 23). The defendant, prior to the commencement of this suit, was requested, on behalf of the complain-

ant, to render to him an account of the sales above-mentioned, but refused so to do. (Transcript, p. 8, f. 25).

The said Noble, at the time of the commencement of this suit, was a non-resident of this State, and could not be found therein. (Transcript, p. 8, f. 25).

Upon the entry of the said decree, Robinson went into possession of the said Illinois lands, and received from the parties who were directed by the said decree to execute the same, all such conveyances and releases as were necessary or proper to assure to him an absolute title in fee-simple to the said lands, free from all incumbrances. (Transcript, p. 7, f. 21).

At the end of folio 43, page 14, of the Transcript of Record, the defendant in his answer admits the allegations and statements contained in the bill of complaint not thereinbefore specifically admitted or denied down to the end of line 12, folio 42, of the original bill. This corresponds to the end of folio 25, page 8, of the printed transcript, *i. e.*, the interrogating part of the bill.

This cause came on to be heard on the 24th day of May, 1873, before Mr. Justice Ward Hunt (Transcript, p. 44, f. 138), and, after argument on both sides, the cause was submitted, and subsequently, on the 15th day of October, 1873, a decree was entered that the complainant's bill of complaint in the action be dismissed with costs (Transcript, p. 46, f. 145). An opinion by Mr. Justice Hunt was rendered, which is set out on pages 44, 45 and 46 of the Transcript of the Record herein (fols. 139 to 145).

The complainant thereafter duly prosecuted his appeal to this Court, and an abstract of the pleadings, proofs, and proceedings herein is set out on pages 46 to 53 (fols. 148 to 165) of the Transcript of the Record herein.

The cause was submitted to this Court by both parties upon printed briefs upon the 12th day of October, 1877; and thereafter, and in the beginning of January of the present year, the Court *being equally*

divided, affirmed the judgment. Subsequently an application on behalf of the appellant was made for a re-hearing, and on the 25th of February, 1878, an order was made granting the motion and assigning the cause for re-argument on the 2d of April, 1878.

STATEMENT OF ERROR.

The appellant insists that the decree of the said Circuit Court, and every part thereof, is erroneous, in that it refused to grant to the appellant the relief prayed for in his bill of complaint, and dismissed the said complaint with costs, whereas it should have granted to the said appellant such relief.

ARGUMENT.

FIRST.

The defendant, John Robinson, must account, *as trustee*, to this complainant, for all the moneys which he received on the sales of the New York lands mentioned in the complainant's bill of complaint, amounting, in the aggregate, to the sum of $9,628.\frac{00}{100}$ (see Transcript, p. 14, f. 44), together with interest on the proceeds of such sales from the respective times at which they were made.

A. The decree of the Illinois Court stated an account between the parties then before it. The complainant Shillaber was charged with the full contract price of the New York lands (Transcript, p. 3, fols. 9 and 10; also p. 29, fols. 91 and 92). This constituted a payment for the same, and passed the *equitable* title in those lands to Shillaber, leaving the *bare legal* title in Robinson, he holding the lands in trust for the complainant.

Hill on Trustees, p. 171 (star paging).
Bispham on Principles of Equity §§ 95, 364.

The decree of the Court operated as the means of changing the status of each of the several parties, and from it all their rights and liabilities arise, and to it we must look to determine those rights and liabilities. By the decree specific performance was enforced; the Illinois lands by it were transferred directly to Robinson, the New York lands to Shillaber; and this though the Court had no jurisdiction over the subject matter, provided it had jurisdiction of the person.

Massey v. Watts, 6 Cranch, 148.
Northern Ind. R. R. Co., v. Michigan Central R. R. Co., 15 How. 233.
Brown v. Desmond, 100 Mass. 267.
Penn v. Lord Baltimore, 1 Ves. 444.
Fry on Specific Performance, § 63.
Pennoyer v Neff U.S. Sup Ct. Feby 1878 5 Reporter 353.356.

A Court of Equity of competent jurisdiction can adjust the equities of the parties before it, and, in accordance with a familiar principle, it regards that, which is agreed to be done, as already performed.

Story's Equity Juris., § 64 (*g*).
Hill on Trustees (*ut supra*).
Francis's Maxims, 13.
1 Fonb. Eq., Bk. 1, Ch. 6, § 9.

B. The Court in so adjusting the equities adjudged that the defendant Robinson should not be required to convey the New York lands to Shillaber, to part with the legal title still remaining in him, *without some security or lien thereon* for the payment to him of the balance found due by the decree, in the account stated, to Robinson from this complainant, and that the same ought to be paid within a reasonable time (Transcript, p. 31, f. 101). The Court then proceeded to furnish means for the creation and enforcement of this *lien* (Transcript, p. 31, fols. 101 and 102). Robinson was directed to make a deed of the

New York lands and deposit the same with the clerk of the Court. In case Shillaber should pay the balance so found due, the deed should be delivered to him; otherwise, after the expiration of ninety days from the date of the decree, the *lien*, created by the decree, was to be *foreclosed, and as a means of so foreclosing this lien, a trust deed* was to be executed to one Silas Noble, of the said lands, and he was to proceed to sell the same "*in such manner and after giving such* "*reasonable notice of the time and place of such* "*sale as might be usual or provided by law in the* "*State of New York.*" (Transcript, pp. 32 and 33, fols. 105 to 109.)

The general intention of these provisions was to constitute Robinson a mortgagee, and this complainant a mortgagor of the lands in question, and it is a leading maxim of construction that the intention of the parties is the controlling element.

Mitchell v. Tilghman,
19 Wall. 287, 395, Clifford, J.

(*a.*) The decree and all its provisions must be construed in the light of all the circumstances under which it was made, and the intention of the Illinois Court, as determined by the words of the decree, and the relative situation of the subject matter, must give shape to the transaction.

Nash v. Towne, 5 Wall. 689.

The language of Mr. Justice Clifford in that case (page 699), applies with apparent and equal force to the case under consideration, when he says: "Courts, in the construction of contracts, "look to the language employed, the subject "matter, and the surrounding circumstances. "They are never shut out from the same light "which the parties enjoyed when the contract

" was executed, and in that view they are entitled " to place themselves in the same situation as the " parties who made the contract, so as to view " the circumstances as they viewed them, and so " to judge of the meaning of the words and of " the correct application of the language to the " things described."

(1.) The terms " trust deed," and " mortgage," are used in Illinois and other Western States, if not synonymously, at least interchangeably. The statutes and decisions of the Courts of that State show that this is the fact; and many jurists in the different States maintain that there is no substantial difference between a " deed of trust " in the nature of a mortgage" and a " mort- " gage."

Hoffman v. Mackall, 5 Ohio St. 124, 130.
Ingle v. Culbertson, 43 Iowa 265, 271.
McQuie v. Peay, 58 Mo. 56.
Adams and Durham's Real Estate Statutes and Decisions of Illinois, 202, 1702.
Pardee v. Lindley, 31 Ill. 174.
Wilson v. McDowall, 78 Ill. 514.

In the last two cases cited, the terms are applied indiscriminately to the same instrument.

The language of Bartley J., in Hoffman v. Mackall, (*supra*), at page 130, appears pertinent:

" There is a manifest and well settled dis- " tinction between an *unconditional deed of trust*, " and a *mortgage or deed of trust in the nature of a* " *mortgage*. The former is an *absolute* and *in-* " *defeasible* conveyance of the subject matter " thereof, for the purpose expressed, whereas " the latter is *conditional* and *defeasible*. A mort- " gage is the conveyance of an estate or pledge " of property, as security for the payment of " money, or the performance of some other

"act, and conditioned to become void upon "such payment or performance. A deed of "trust *in the nature of a mortgage*, is a convey- "ance in trust *by way of security*, subject to a "condition of defeasance, or redeemable at any "time before the sale of the property. A deed "conveying land to a trustee as mere collateral "security for the payment of a debt, with the "condition that it shall become void on the "payment of the debt when due, and with "power to the trustee to sell the land and pay "the debt in case of default on the part of the "debtor, is a deed of trust *in the nature of a* "*mortgage*. By an absolute deed of trust, the "grantor parts *absolutely* with the title, which "rests in the grantee unconditionally, for the "purpose of the trust. The latter is a convey- "ance to a trustee for the purpose of *raising a* "*fund to pay debts*, while the former is a convey- "ance in trust for the purpose of securing a "debt, subject to a condition of defeasance."

And the Courts of the United States will take judicial notice of the laws and judicial decisions of the several States.

Junction R. R. Co. v. Bank of Ashland,
12 Wall. 226. Bradley, J. at p. 229.

Cheever v. Wilson,
9 Wall. 108. Swayne, J. p. 121.

(2.) The distinction between trust deeds and mortgages, is at the most only a technicality, (Wilkins v. Wright, 6 McLean, 340), and it is laid down by more than one authority of weight that they are in legal effect the same.

Jones on Mortgages, Sections 60, 62, 1769.
Southern Law Review, (N.S.) Vol. III, p. 712, Dec.–Jan. 1877–8.
Hoffman v. Mackall, 5 Ohio St. 124.
Woodruff v. Robb, 19 Ohio 212.

Coe v. Johnson, 18 Indiana, 218.
Coe v. McBrown, 22 Indiana, 252.
Newman v. Samuels, 17 Iowa, 528, 535.
Ingle v. Cuthbertson, 43 Iowa, 265, 271.
Sargent v. Howe, 21 Illinois, 148.
Eaton v. Whiting, 3 Pickering, 484.
Lenox v. Reed, 12 Kansas, 223, 227.
Turner v. Watkins, 31 Arkansas, 429, 437.
In re Bondholders of York and Cumberland Railway, 50 Me. 552.
Palmer v. Gurnsey, 7 Wend. 248.
Lawrence v. Farmers Loan & Trust Co., 13 N. Y. 200.
Corpman v. Baccastow, Sup. Ct. of Penn. 1877, 5 N. Y. Weekly Digest, 204.
Dillon, J. in 2 Am. Law Reg. N. S. 648.

Mr. Justice Dillon, in an able and exhaustive article *(ut supra)* upon the subject of trust deeds says:

"A mortgage with a power of sale and a deed "of trust where the power of sale is placed in "a third person, are in substance the same. "Some of the cases have denied this. But "those taking this view are numerous."

In the case at bar, the power of sale is placed in Noble, a third person. (Transcript, p. 5 f. 15.)

Jones, in his recent work on mortgages (§ 62) uses the following language:

"A deed of trust to secure a debt, is in legal "effect, a mortgage. It is a conveyance made "to a person other than the creditor, conditioned "to be void if the debt be paid at a certain "time, but, if not paid, that the grantee may sell "the land and apply the proceeds to the extin-"guishment of the debt, and pay over the sur-"plus to the grantor. The addition of the power "of sale does not change the character of the "instrument any more than it does when con-

" tained in a mortgage. Such a deed has all the " essential elements of a mortgage; it is a con- " veyance of land as security for a debt. It " passes the legal title to the grantee just as a " mortgage does, except in those States where " the natural effect of a conveyance is controlled " by statute; and in those States as a general " rule it is considered merely as a security, and " not a conveyance, just as a mortgage is con- " sidered. Both instruments convey a defeasi- " ble title only, and the right to redeem is the " same in one case as it is in the other. The " only important difference between them is that " in the one case the conveyance is directly to " the creditor, while in the other it is to a third " person for his benefit."

In Ingle v. Culbertson (*ut supra*), at page 271, Seevers, Ch. J., says:

"It is insisted that the trust deed vested the " legal title in the trustees, and that the property " in dispute upon the execution of the trust, " belonged to the trustees, hence that it follows " they could sell and dispose of it as their own, " and the question whether they sold it in ac- " cordance with the terms of the trust is not " material. In this view we do not concur. " The trust deed shows on its face that it was " given as security for the money specified " therein, the payment of which amount at any " time previous to a sale of the premises, " amounted to a satisfaction of the trust " deed. * * * A re-conveyance by the " trustees being deemed unnecessary to vest the " full and legal title in the grantor discharged of " the trust, it matters not what these instru- " ments may be called, whether deeds of trust " or mortgages with a power of sale, or simple " mortgages only; the grantee has a right of re- " demption which cannot be taken away, except

"by a statutory foreclosure, or the same thing "effected in substantial accord with the power "or law of the trust deed or mortgage. (Sar- "gent v. Dillon, 9 Iowa, 407; Newman v. De "Lorimer, 19 Iowa, 244; Perry on Trusts, §§ 227, "602 P, 602 L.)"

In Turner v. Watkins, (*ut supra*) Mr. Justice Walker says:

"The attributes of a deed of trust for such "purpose, and a mortgage with power of sale, "are the same; both are intended as securities "and are, in a legal sense, mortgages; in both, "the legal title passes from the grantor; but in "equity he is, before foreclosure, considered the "actual owner in both, and as broadly in one as "the other; the grantor has the right to redeem "in other words, the equity of redemption, which "can only be barred by a valid execution of the "power." (pp. 437, 438.)

(*b.*) The fact that the decree of the Illinois Court calls the instrument from the defendant to Noble a "trust deed," (Transcript, p. 33, f. 109) is not of governing importance. With that instrument the complainant is only connected by means of the other proceedings. The deed, as between Robinson and Noble, may be a technical trust deed, but it cannot affect the rights of a third person, not a party to the instrument. The defendant would have it that this instrument acted of itself to divest the complainant Shillaber of his interests in the lands in question, in this manner changing the position of the complainant from that of a mortgagor, acquired under the decree, to that of a grantor, so violating the cardinal principle of the law of real estate, "Once a mortgage always a mortgage."

2 Washburn on Real Property, (4th Ed.) pp. 61, 62.
Coote on the Law of Mortgages, p. 11.

(c.) The decree expressly declares, that the object of giving the trust deed and of making all the provisions concerning the New York lands, is to give Robinson a *security or lien* (Transcript, p. 31, f. 101), upon the lands, which in equity, belonged to Shillaber, he having paid an equivalent, the contract price charged against him in the settlement of the various equities.

It is a well-known and long established principle of equity jurisprudence, that any transaction of whatever form, devised for the purpose of securing the payment of money is a mortgage. Authority upon this subject is superfluous, but *en passant*, see

Hughes v. Edwards, 9 Wheat. 489.
Conway's Ex'rs v. Alexander, 7 Cr. 218.
Villa v. Rodriguez, 12 Wallace, 323.
Flagg v. Mann, 2 Sumner, 486.
Coote's Law of Mortgages, p. 11.
Story's Eq. Juris., § 1018.

Mr. Justice Dillon (2 Am. Law Reg.—N.S.—648) well says: "No doctrine is more invincibly estab- "lished than that every instrument *intended* to "secure the payment of money or the perform- "ance of some collateral act, is a mortgage. "This is the test: '*If a transaction resolve itself* "*into a security, whatever may be its form, and* "*whatever name the parties may choose to give to* "*it, it is in equity a mortgage*', Per Story, J. (2 "Sumner, 533.)"

New York as early as 1813 (1 Revised Laws, 373, § 3), and again in 1830 (N. Y. Rev. Stats., part 2, title 5, ch. 3, § 3), recognized by statutory enactment the justice of this rule and declared that "every deed conveying a real estate, which by any "other instrument or writing, shall appear to "have been intended only as a security in the

" nature of a mortgage, though it be an absolute " conveyance in terms, shall be considered as a " mortgage."

And the Legislature of Illinois has adopted, substantially, the same statute.

Rev. Stats. of Ill., 1844–5, p. 105, § 12.

And Courts of Equity lean towards construing doubtful instruments as mortgages; and jealously preserve rights of redemption.

Bright v. Wagle, 3 Dana (Ky.) 252.
Edrington v. Harper, 3 J. J. Marsh. 354.
Conway's Exr's v. Alexander (*supra*).
Holmes v. Grant, 8 Paige, 243, 258.
Horn v. Keteltas, 46 New York, 605.

C. There are three methods of foreclosing a mortgage under the New York laws, and since the intention of the proceedings had in Illinois demands that the "trust deed" be construed as a mortgage, either one of these methods must be adopted, or the equity of redemption remains.

(1.) By the decree of a competent court.

(2.) By the proceedings prescribed in part iii., chapter 8, title 15th, of the New York Revised Statutes, commonly called foreclosure by advertisement.

(3) By lapse of time as by the failure of the mortgagor to enforce his remedy against a mortgagee in possession for more than twenty years, by analogy to the statue of limitation.

Hughes v. Edwards, 9 Wheaton, 489.
Demarest v. Wynkoop, 3 Johns. Ch. 129.
Lawrence v. Farmers' Loan and Trust Co., 3 Kern., 200.

Neither the 1st nor 3d of these methods have any application to the case in question.

In the case of Lawrence v. The Farmers' Loan and Trust Co. (*supra*), as in this the instrument under which the sale was made, was not *technically* a mortgage, but a trust deed which the Court held to contain all the essentials of a mortgage, and that it must be foreclosed by advertisement.

(*a.*) The provisions of the New York Revised Statutes, regarding notice, are as follows:

"§ 3. Notice that such mortgage will be "foreclosed by a sale of the mortgaged prem- "ises, or some part of them, shall be given as "follows:

"(1.) By publishing the same for twelve "weeks successively, at least once in each "week, in a newspaper printed in the county "where the premises intended to be sold shall "be situated, or if such premises shall be "situated in two or more counties, in a news- "paper printed in either of them.

"(2.) By affixing a copy of such notice, at "least twelve weeks prior to the time therein "specified for the sale, on the outward door of "the building where the county courts are "directed to be held, in the county where the "premises are situated; or if there be two or "more such buildings, then on the outward "door of that which shall be nearest the "premises. And by delivering a copy of such "notice, at least twelve weeks prior to the "time therein specified for the sale, to the "clerk of the county in which the mortgaged "premises are situated, who shall immediately "affix the same in a book prepared and kept "by him for that purpose; and who shall also "enter in said book, at the bottom of such

" notice, the time of receiving and affixing the
" same, duly subscribed by said clerk, and
" shall index such notice to the name of the
" mortgagor, for which service the clerk shall
" be entitled to a fee of twenty-five cents.

" (3.) By serving a copy of such notice at
" least fourteen days prior to the time therein
" specified for the sale, upon the mortgagor or
" his personal representatives, and upon the
" subsequent grantees and mortgagees of the
" premises, whose conveyance and mortgage
" shall be upon record at the time of the first
" publication of the notice, and upon all per-
" sons having a lien by or under a judgment or
" decree upon the mortgaged premises, subse-
" quent to such mortgage, personally, or by
" leaving the same at their dwelling-house in
" charge of some person of suitable age, or by
" serving a copy of such notice upon said per-
" sons at least twenty-eight days prior to the
" time therein specified for the sale, by depos-
" iting the same in the post-office, properly
" folded and directed to the said persons at
" their respective places of residence."

It is not pretended, on the part of the defendant, that proceedings in conformity with these requirements were taken to foreclose the equity of redemption of this complainant.

The advertisement in an obscure newspaper, "The Brooklyn Standard," once or twice a week for six weeks (Transcript, p. 14, f. 46), so far from complying with the terms of the deed, manifestly shows that those who caused that advertisement to be inserted believed that the provisions of the New York Revised Statutes, on the subject of foreclosure of mortgages, were within the intendment of the Court that made the decree. But the defendant does not claim that a legal foreclosure was

had. The advertisement was entirely nugatory. It did not furnish constructive notice to the party holding the equity of redemption; the fact as shown by the complainant's bill, and not controverted (Transcript, p. 7, f. 23), is that there was no actual notice.

(*b.*) The trustee under the trust deed was, by the provisions of the decree, and of the trust deed, directed to give such reasonable notice as is usual or provided by law in the State of New York (Transcript, p. 33, f. 109, also p. 37, f. 121). The notice given by Mr. Noble, with reference to this clause, is not usual in New York, nor is there any provision of law in New York, requiring or directing such an advertisement as was made on behalf of the trustee.

The word "*usual*" can have no effect, unless it be regarded as identical with the term "*provided by law.*" The law of New York, to which reference is made, prescribes no notice of sale of lands under an express trust, naturally presuming that since the trust is created by agreement, the instrument originating it will contain provisions concerning its execution; and in the absence of such provisions a sale, public or private, with or without notice, is valid. And in the case of mortgages, no notice is usual, except that prescribed by the various New York statutes regulating the foreclosure of mortgages; since the equity of redemption of the mortgagor still continues any other notice is useless. There is, then, in New York, no notice *usual*, except that *provided by law.* The intention of the Court can, therefore, be best construed by interpreting the phrase "*usual* OR *provided by law*" to mean "*usual* AND *provided by law*," as that is the only interpretation that can be given, unless

the word "usual" is entirely rejected, and it is always the province of Courts to give meaning to all the words of an instrument.

Atty. General v. Plank Road Company, 2 Mich. 138.
Palmer v. Stumph, 29 Indiana, 329, 333.
Opinion of the Justices, Massachusetts Supreme Court, 22 Pickering, 571.

And Courts do not hesitate to construe the disjunctive "or" to have the same meaning as the copulative "and," and *vice versa*, in order to effectuate the evident intent of the parties.

Maxwell on the Interpretation of Statutes, page 216.
Potter's Dwarris on Statutes and Constructions, pages 286 and 292.
Fowler v. Padget, 7 T. R. 509.
Roome v. Phillips, 24 New York, 463.
Arnold v. Buffum, 2 Mason, 208, 222, 226.

(*c.*) Trustees are bound to comply strictly with the requirements of the instrument originating and defining their power and authority.

1 Hilliard on Mortgages, 4th ed. 143.
Hill on Trustees, 474, 2d Am. ed.
Thornton v. Boynton, 31 Ill. 200.
Hull v. Towne, 45 Ill. 493.
Griffin v. Marine Co., 52 Ill. 130.
Strother v. Law, 54 Ill. 413.
Jencks v. Alexander, 11 Paige, 619.
Tarascon v. Ormsby, 3 Litt. (Ky.) 404.
Wallis v. Thornton, 2 Brocken, 422.
Gray v. Shaw, 14 Mo. 341.
Smith v. Proven, 4 Allen, 516.
Roche v. Farnsworth, 106 Mass. 509.

In Wallis v. Thornton, (*supra*) Chief Justice Marshall, speaking of an instrument, connect-

ed with a transaction, remarkably like that under consideration, says: "A trustee has "no power which the deed does not expressly "give."

(*d.*) Courts of Equity are adverse to, and have ever been suspicious of, sales under power of sale mortgages, or trust deeds, without notice to the mortgagor; and with extreme reluctance have, in some few cases, under peculiar circumstances, upheld such sales; and special requirements of notice in the deed itself, or the instrument originating the trust, have been enforced with the utmost rigor.

Anonymous, 6 Madd. Ch. 10.
Gill v. Newton, 12 Jurist (N. S.) 220.
Major v. Ward, 5 Hare, 598.
Longwith v. Butler, 3 Gilman (Ill.), 32.
Tarascon v. Ormsby, 3 Littell (Ky.) 404.
Flower v. Elwood, 66 Illinois, 438.
Bigler v. Waller, 14 Wallace, 297.
Jones on Mortgages, § 1822.

In the anonymous case in Maddock (*supra*), an injunction was granted, restraining a person occupying the position of a trustee for sale, from proceeding precipitately without notice to the mortgagor of the intention of the trustee to sell, it being his duty to attend to the interests of both *cestuis que trustent*, the mortgagor and mortgagee.

D. Since no proceedings were had amounting to a legal foreclosure of the equity of redemption of Mr. Shillaber in the New York lands, the only effect of the sale of the said lands to the defendant John Robinson, through John A. Robinson, was to revest John Robinson with the same title which he held previous to the execution of the "trust deed." The proceedings under the trust deed, by reason

of non-compliance with the prescribed provisions of the trust deed and decree, and consequent non-execution, were nugatory, and left the parties in the same plight they were in prior to those proceedings. Robinson still remains mortgagee, subject to all the disabilities and invested with all the rights of a mortgagee in possession.

Willard's Eq. Juris. p. 608 and cases.
Murray v. Ballou, 1 Johns. Ch. 574.
Gilchrist v. Stevenson, 9 Barb. Sup. Ct. 9.
Bigler v. Waller, 14 Wallace, 297.

E. If Robinson were still in possession of the lands in question, there can be no doubt that the complainant would be entitled to a conveyance thereof, upon payment to the defendant of whatever sum of money still remained due him under the decree of the Illinois Court, and the same result would follow if the said lands had been conveyed to, and were now in the possession of, parties having notice of the complainant's rights in the premises.

Willard's Eq. Juris. p. 608.
Oliver v. Pratt, 3 How. U. S. 333, 401, Story, J.
Shepherd v. McEvers, 4 Johns. Ch. 138.
Bloom v. Van Renssalaer, 15 Ill. 503.
Montague v. Dawes, 12 Allen, Mass. 397.
S. C. 14 Id. 369.

F. But the defendant, Robinson, has fraudulently concealed from all the world, the title which he now claims to have acquired to the said lands under the said decree, (transcript, p. 7, f. 23,) and he has sold them under his original title thereto, (transcript, p. 14, f. 44,) without any regard to the proceedings had in Illinois, to parties ignorant of the complainant's equitable rights therein. The trust deed made by the defendant to Noble, and the deed of Noble to John A. Rob-

inson, have never been recorded in either of the counties in the State of New York, Kings, Essex or Sullivan, where the lands in question are situated (transcript, p. 7, f. 23.) The notice of sale by Noble was published as privately as possible in an obscure newspaper in Kings county, (transcript, p. 14, f. 46.) The expenses of the proceedings were defrayed entirely by the defendant, for it appears by his answer that he paid Noble no part of the purchase money, *except by crediting him therefor on account of the sum payable to the defendant under the said decree*, (transcript, p. 14, f. 45.) He did not purchase at said sale from Noble in his own name, but in the name of one John A. Robinson, who he admits purchased the lands in question for him, (transcript, p. 13, f. 42,) and who has never conveyed them to him, and the deed of Noble to John A. Robinson has not been recorded.

This course of proceeding shows, beyond peradventure, that Mr. Robinson has taken two inconsistent positions in regard to the lands in New York. In Illinois he would insist that they are, after the rendering of the decree, no longer his; in New York he would maintain, and in action he has done so, that the Illinois proceedings were of no avail. The lands in Flatbush and in Sullivan and Essex counties were still his, notwithstanding the decree of the Illinois Court had conveyed them directly to this complainant! By not recording the deeds made in pursuance of the decree, he relieved subsequent purchasers, without actual notice, from all liability. To interpret the rights of the defendant, in accordance with the view adopted by him herein, the title is in John A. Robinson.

These facts, together with the gross inadequacy of the sums for which the said lands are alleged to have been purchased by the defend-

ant at such sale fully sustain the charges in the bill, of a fraudulent connivance between the defendant and Noble to defeat the provisions of the Illinois decree in favor of this complainant, and are alone sufficient to render the defendant accountable to this complainant for all moneys which he received upon the subsequent sales by him of the lands in question, with interest thereon from the dates when they were respectively made.

Story's Eq. Juris., §§ 1,015, 1,016.
Willard's Eq. Juris., p. 607.
Bispham's Princ. of Eq., § 157, and cases.
Snell's Princ. of Eq., p. 250. *et seq.*

And indeed, under these circumstances, the defendant is chargeable not only with the moneys which he so received, but also with all additional sums which the premises may be reasonably worth at the present day. Having kept the mortgagor out of possession, he is bound to see into whose hands they go, and if the mortgagor is subsequently entitled to recover possession, it is but just and equitable that he should have it at its present worth, or if, as in this case, the mortgagee has parted with the possession in favor of an innocent third party, he (the mortgagor) should have the equivalent of its present worth.

Snell's Principles of Equity, p. 250.

G. But it is not necessary to make out a case of fraudulent connivance between Noble and the defendant in order to entitle this complainant to the account which he desires. It is sufficient that the defendant is a mortgagee in possession of the lands. His position is that of a trustee for this complainant, and he is bound as such to take the greatest care of the interests of the latter, and when called on for an ac-

counting, to show that he has performed the duties of a faithful trustee, in relation to the mortgaged property.

Story's Eq. Juris., § 1016.
Bigler v. Waller, 14 Wallace, 297.
Russell v. Southard, 12 Howard, 139, 154.

H. If, as is claimed by the answer of the defendant, the deed from the defendant Robinson to Noble was not in the nature of a mortgage, but created a valid trust under the New York Statutes for the sale of the said land for the payment of the balance found due by the decree to Robinson, what is the object or effect of the provisions of the decree and, indeed, of the trust deed itself, which annex to the power of sale in Noble the *condition* that such sale shall be made in such manner, and after giving such reasonable notice of the time and place of sale, as is usual or provided by law in the State of New York? The New York Statutes authorizing the creation of trusts for the payment of debts are utterly silent as to the manner in which such sales may be made (New York Revised Statutes, Part II., ch. 1, art. 2., "Of Uses and Trusts,") leaving such matters to be settled by the agreement of the parties in the creation of the trusts, and, in the absence of contrary directions, the sale may be public or private, and with or without notice, in the discretion of the trustee, subject as he is to the control of Courts of Equity, in accordance with the fundamental principles of equity jurisprudence.

If, then, this view be taken, the provisions concerning notice of time and place of sale of the New York lands embraced within the decree of the Illinois Court and of the trust deed are nugatory and superfluous. On the other hand, considering the whole transaction, as all the

circumstances and the express terms of the decree show it was intended to be considered, as a trust deed in the nature of a mortgage, a mortgage with a power of sale in a third party, (in this case Noble), those provisions have full effect. Notice is necessary in this case, and the New York Statutes are clear and explicit in regard to such notice. The presumption certainly is that these words are to have an effect.

SECOND.

The decree must be construed so as to ensure to Robinson a security or lien for the payment of the balance found due him, and a mode of foreclosing it, without *unnecessary* prejudice to the rights of the complainant. This was a proceeding *in invitum*, this complainant at the time the decree was made being neither present nor represented by counsel. Equity requires that the construction of the proceedings most favorable to parties unavoidably absent, without prejudicing the rights of the others, shall be had.

By the construction claimed by the defendant, if it be the correct one, Robinson has been enabled, without any notice to this complainant, to purchase the whole of these lands for less than one-third of the price at which they are valued in the contract of sale, and for about the same sum for which within ten months thereafter he sold a single section of the said Flatbush lands. The final result of the intended adjustment of the *equities* between the parties being that this complainant has been compelled to convey to the defendant Robinson about 1,730 acres of land in the State of Illinois, of the value of nearly $12,000, and has received nothing whatever therefor; Robinson, through the intervention of a Court of *equity*, retained possession of the New York lands; and in addition to this, Shillaber finds himself indebted to Robinson in the sum of over

$2,000, with interest thereon from the 16th day of March, 1861. That equity would work such a hardship is, beyond all question, contrary to principle and authority, opposed to all notion of right and justice.

By the construction which the complainant claims this entire transaction is in the nature of a mortgage, the complainant's equity of redemption, the same not being foreclosed in the manner prescribed by the instrument creating the lien and authorizing its enforcement, is preserved and still vested in him, together with the right to a legal notice of proceedings to foreclose the same, and beyond a little longer delay in the receipt of his money, Robinson is not prejudiced thereby in the slightest degree. This construction gives effect to all the provisions of the decree, is an equitable adjustment of the rights of the parties, and is most consonant with right and justice.

THIRD.

Even if the deed which was made by the defendant Robinson to Noble in pursuance of the terms of the decree be regarded as a strict unconditional trust deed, as creating an express trust under the New York Statutes for the sale of land, Robinson was not authorized by the said decree to become the purchaser at any such sale, and in the absence of an express permission by the instrument originating the alleged trust, he could not, *under the circumstances of this case*, acquire the title to said lands by such a sale, directly or indirectly.

Fulton v. Whitney, 66 N. Y. 548, 555–7.
Blake v. Buffalo Creek R. R. Co., 56 N. Y. 485, 490, 491.
Case v. Carroll, 35 N. Y. 385, 388.
Gardner v. Ogden, 22 Id. 327, 343.
Colburn v. Morton, 3 Keyes, 296, 305.

Conger v. Ring, 11 Barb. (Sup. Ct. Rep.) 356, 363.
Van Epps v. Van Epps, 9 Paige's Ch. 237.
Davoue v. Fanning, 2 Johns. Ch., 252.
Bergen v. Bennett, 1 Caine's Cases in Error, 11, 13, 20.
Michoud v. Girod, 4 How. U. S. 503.
Ringo v. Binns, 10 Peters, 269.
Lockett v. Hill, 1 Wood's U. S. Circuit, 552.
Dexter v. Shepard, 117 Mass. 480.
Dyer v. Shurtleff, 112 Mass. 165.
Montague v. Dawes, 12 Allen, 397.
S. C. 14 Id. 369.
Benham v. Rowe, 2 Cal. 386.
Parmenter v. Walker, 9 R. I. 225.
Ex parte Bennett, 10 Vesey, 381.
Coles v. Trecothick, 9 Ves. 234.
Ex parte Hughes, 6 Vesey, 617.
Washburn on Real Property, vol. 2, p. 79 (4th ed., 1876.)
Sugden on Vendors and Purchasers, chapter xx, § II. ¶ I.

This rule embraces trustees, mortgagees, and all other persons occupying a fiduciary capacity, their agents or their assignees.

Hill on Trustees, 159, 160.
Mapps v. Sharp, 32 Ill. 13.
Waite v. Dennison, 51 Ill. 319.

In a few cases Courts have held that the sales so made were valid, but only when a marked spirit of fairness pervaded the entire transaction and due care was taken to preserve the rights of all interested.

Coles v. Trecothick, 9 Vesey, 234.
Howard v. Davis, 6 Texas, 174.

But so careful are the Courts to guard safely the interest of beneficiaries that in all cases found in the books, wherever any attempt to act unfairly, to stifle

competition, or in any manner to take undue advantage of the fiduciary has been made, such sales have been set aside, provided innocent third parties would not suffer thereby.

Longwith v. Butler, 3 Gilman, 32.
Griffin v. Marine Co., 52 Ill. 130.
Flower v. Elwood, 66 Ill. 436, 449.
Sugden on Vendor and Purchasers, chapt. 20, § II, ¶ 1.

Mr. Washburn in his work on real property, (*ut supra*) speaking of a trust deed in form precisely like the one in question, says: "It has been generally held that he" (i. e. the trustee, a third person) "cannot become a pur- "chaser of the estate, and whether the creditor in whose "favor the trust has been created can become a pur- "chaser at a sale thereof, at auction or not, has been "variously held, depending upon whether in making "such sale the trustee acted independently of any con- "trol or direction of the creditor, as well as fairly, or "whether the creditor had the power to control the "sale" (page 81).

This language is aptly suited to the case in question. The defendant, Robinson, is the *creditor* for whose benefit the entire matter was set on foot; the complainant, Shillaber, being the *debtor* under the decree of the Illinois Court, and Noble, the *trustee* to sell. The facts charged in the complainant's bill, and not controverted by the defendant's answer, show that the defendant controlled the sale, that he paid the expenses of the sale; while the grossly inadequate price for which the lands were sold; and the facts that Robinson procured the purchase to be made in another name, that the deeds were never recorded in the State of New York where the real estate is situated, and that he subsequently sold the said lands without regard to his alleged title under which he now claims, all show that the proceedings were not carried on in a spirit of fairness, and that no regard was had for the interests of the complainant.

The rule as laid down by Sugden *(ut supra)* is as follows:

"It may be laid down as a general proposition "that trustees who have accepted the trusts, (un- "less they are nominally such,) as trustees to "preserve contingent remainders, agents, com- "missioners of bankrupts, assignees of bank- "rupts or of insolvents, whilst the distinction re- "mained, or their partners in business, solicitors "to the commissions, auctioneers, *creditors who "have been consulted as to the mode of sale*, counsel "or any persons who, by being employed or "concerned in the affairs of another, have ac- "quired a knowledge of his property, are inca- "pable of purchasing such property themselves, "except under the restrictions which will shortly "be mentioned. For if persons having a con- "fidential character were permitted to avail "themselves of any knowledge acquired in that "capacity, they might be induced to conceal "their information, and not to exercise it for the "benefit of the persons relying on their integ- "rity. The characters are inconsistent."

Sugden on Vendors and Purchasers, chap. 20, § 2, par. 1.

Courts of Equity are very jealous of guarding the equity of redemption of mortgagors, and slight evidence of circumstances tending to show that undue influence has been used, or any unjust advantage taken to induce the mortgagor to part with his equity of redemption, has been deemed sufficient to relieve him from any hardship caused thereby.

2 Washburn on Real Property, (4th ed.) page 62.
Bispham's Principles of Equity, § 153.
Newcomb v. Bonham, 1 Vernon, 7.
Johnston v. Gray, 16 Sergeant and Rawle, 361.

Waters v. Randall, 6 Metcalf, 479.
Villa v. Rodriguez, 12 Wallace, 323.
Jewett v. Cunard, 3 Woodbr. and Minot, 277.

The language of Mr. Justice Swayne in Villa v. Rodriguez, (at page 339) is peculiarly appropriate, and may serve as a safe guide in construing like instruments.

> "The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by a mortgagor, it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered, and never intended to reclaim, is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law."

FOURTH.

(1.) It is submitted that the learned Judge in the Court below was in error when he stated that the sole question arises upon the effect of the trust deed to Noble (Transcript, p. 45, f. 143). He appears to have overlooked the importance of regarding the trust deed as ancillary to the decree, and to have considered the positions of the complainant and defendant, as determined by that deed alone.

The deed from the defendant, Robinson, to Noble, by direct reference, included within its terms the provisions of the decree (trust deed, transcript, p. 37, f. 120), where the words of the instrument are as explicit as could be desired for that purpose, and so incorporated within it the decree, stating that it was executed *in obedience to and conformity with said decree, and to carry out the requirements and provisions thereof.*

The decree, then, should be regarded as the principal, the trust deed, as subordinate, and the latter in all its provisions should be governed in all respects by the former. What effect would the trust deed have as it stands, were it not for the fact that the decree gives it vitality? If the decree, then, causes the deed to operate, it is but proper that this operation should be guided by the object, provisions, and intent of the decree.

Another evidence contained within the trust deed, of the fact that this deed was to be treated as subordinate to the decree, may be seen in the directions given therein to the trustee concerning the disposition of the proceeds. After providing for the payment of the expenses, and the satisfaction of the claim of the defendant, Robinson, if any balance remains, the trustee is directed "*to hold the same subject to the further order of "the Circuit Court, in and for Rock Island County in*

"*the State of Illinois*," to be disposed of for the benefit of this complainant (Transcript, p. 37, f. 122.)

(2.) Mr. Justice Hunt, it is submitted, again erred when he remarked that had the conveyance been in form to Shillaber upon the settlement, the strongest equity in favor of the complainant had been assumed (Transcript, p. 45, f. 144). Had this been done as stated, and Mr. Shillaber thereupon conveyed to Noble, upon a like trust to that contained in the deed from the defendant to Noble, many of the equities of this complainant would have been destroyed.

The *lien* or *security* afforded to the defendant by the decree of the Illinois Court would then become *executed*, instead of, as now, *executory*, and the "deed of trust" therein provided would be altered from a *means* of carrying into effect the object of that decree into the *effect* itself. Hence, there would exist some reason for confining the consideration of the relative rights of the parties to the trust deed, and shutting out the decree, whereas, under the proceedings, as they in reality were had, those rights could only be ascertained and determined by regarding those proceedings as an entirety. Had the complainant himself made the deed to Noble, he could have limited and disposed of his equity of redemption with greater facility than could be done in a proceeding *in invitum*, as this is; and then Mr. Shillaber being a party to the instrument, it could be construed with far greater force against him. Whether or not it would be an equitable mortgage, would depend on the then necessarily varied positions of the parties. Mr. Shillaber being the grantor in the deed would occupy, in law, the position now held by the defendant and the deed being created, as of necessity it would be, for the benefit of Robinson, the *cestui que trust*—a valid express trust under the New York law, might then be created. The supposition of the learned justice, therefore, makes no concession in favor of this complainant; but, on the contrary, the occurrence of such a state of facts as he suggests would operate rather to the benefit of the defendant.

FIFTH.

In the account so to be taken, the defendant will, of course, be allowed to offset whatever sum of money is due him by the complainant, under the said Illinois decree. There is, however, a palpable error (Transcript, p. 6, f. 18), in the account stated by the said decree, the correction of which will reduce the balance found by said decree against this complainant from the sum of $4,249.58 to the sum of $880.58, and this correction should be made.

A. The error in question arose in this way: The Illinois decree was made about eight years after the date of the contract, which it adjudged should be specifically performed by this complainant, (Transcript, p. 27, f. 86, also p. 34, f. 113). The entire rents and profits, during that period, of the lands in Illinois, which this complainant is directed to convey to Robinson, are allowed to the latter, (Transcript, p. 29, f. 92) and, as a matter of course, the interest for the same period on the contract price of these lands should have been allowed to this complainant, but by an ingenious wording of the decree (at the settlement of which it is admitted that this complainant was *neither* present *nor* represented by counsel) this complainant is only allowed interest on a portion of said contract price, viz., on the sum of $4,695.32, (Transcript, p. 29, f. 92), whereas the whole contract price, as stated in said decree, amounts to the sum of $11,695.32, (Transcript, p. 29, f. 91), leaving the sum of $7,000, the interest on which, for the above-mentioned period, amounts to $3,360, which being deducted from the apparent balance $4,-249.58 against this complainant, as found by

said decree, leaves the sum of $880.58, which is the real balance then due.

B. There is no reason whatever why this complainant should have been allowed interest on a portion of the contract price of the Illinois lands, which he is directed to convey to Robinson and not on the whole, and it cannot therefore be presumed that such a result was intended by the Court which made the decree in question.

It was either caused by a mere clerical error, or by a fraudulent design on the part of those who drew the decree, and in either case the error should be corrected.

Quivey v. Baker, 37 Cal. 465.
Colwell v. Warner, 36 Conn. 224.
Crim v. Handley, 4 Otto, 652, 658–9.
Wilson v. Boughton, 50 Mo. 17.
Boon v. Miller's Ex'rs. 16 Mo. 457.
Barthell v. Roderick, 34 Iowa, 518.
Partridge v. Harrow, 27 Iowa, 96.
Brewer v. Jones, 44 Ga. 71.
Kohn v. Lovett, 43 Ga. 179.
Freeman on Judgments (2d ed.) § 500 a.
Story's Eq. Juris., §§ 166, 523.

The case of Quivey v. Baker (*ut supra*) was as follows:

One Joseph S. Ruckle agreed to make a mortgage to Peter Quivey on real estate owned by him. A certain lot was intended to be included in the conveyance, but the scrivener in drawing the mortgage, made a mistake in the description of this lot. The mortgage was subsequently foreclosed, the same erroneous description occurring in the complaint, decree of foreclosure, order of sale, and Sheriff's deed. Peter Quivey purchased at the sale and afterwards by quit-claim deed, in which the lot was correctly described, conveyed the premises to one Ward, and

by proper mesne conveyance Cole became the owner. Cole commenced an action against Ruckle, Quivey and the Sheriff to correct the error. While this action was pending Ruckle, by absolute deed, conveyed the lot to Francis M. Quivey, the plaintiff, the real party in interest being Peter Quivey. Francis M. Quivey sued to recover possession from Baker, the tenant of Cole, who intervened, and set up as an equitable defence, the facts recited and prayed that his title under the foreclosure proceedings be confirmed, and for general relief. Upon the trial the judgment roll in foreclosure was introduced. It was urged that the judgment roll was of no aid to Cole, as neither the mortgage, complaint, decree of foreclosure, order of sale, nor Sheriff's deed, had any reference to the lot in contest. The Court held, however, that the judgment should be then corrected, and that Cole was entitled to this reformation as a right.

Crockett, J., says: "It is a well settled prin-
" ciple that mistakes in written instruments may
" be corrected in a Court of Equity. * * *
" But it is said the mortgage cannot now be re-
" formed, because it has become merged in the
" judgment of foreclosure, and that it is not
" competent for a Court of Equity to reform the
" judgment and the Sheriff's deed. We have
" been referred to no authorities in support of
" this proposition, and on principles of reason
" and justice, we do not perceive why a Court of
" Equity may not reform mistakes in judgments
" or decrees in like manner as in written instru-
" ments."

In Colwell v. Warner, *(ubi supra)* the facts were as follows: The parties in a foreclosure suit had agreed upon a time for redemption, which by mistake had not been inserted in the decree, and the mortgagor had failed to redeem within the time agreed upon.

He, subsequently discovering that the omission had been made, brought an action to redeem. The mortgagee among other things, prayed the Court to correct the decree. Held, that the correction should be made.

In Partridge v. Harrow, *(ut supra)* it appeared that the clerk of a court, in assessing the amount due, made a mistake, fixing the amount at too small a figure, and the judgment entered thereon had been affirmed on appeal. Held, that the plaintiff by proceeding in equity, could have the error corrected, the correction being in respect to a matter not passed upon by the Court.

In Wilson v. Boughton, *(ubi supra)* it appeared that the attorney, who had conducted a case, made a mistake in computing interest, and the judgment was entered therein for $405.55, when it should have been for $507.80. Held, that it would be corrected on a suit brought for that purpose.

SIXTH.

Noble is not a necessary party to the suit.

1st. It appears by the bill that the said Noble is a non-resident of the State of New York, and cannot be found therein. (Transcript, p. 8, f. 25.)

See 22d Equity Rule.

2d. The only object in making Noble a party to the Illinois suit after the death of John Shillaber, was to enable Robinson to enforce against him as administrator of the personal estate of said John Shillaber any *personal* judgment which

Robinson might have obtained in that suit, and as the result shows, he was not a necessary party even for that purpose—the balance found due to Robinson in that suit being much less than the value of the lands in the State of New York, which he had contracted to convey to said John Shillaber. It is true that Noble was by the decree in that suit made a trustee to sell those lands for the payment of such balance, but he was to bring the surplus into Court (Transcript of Record, page 5, folio 16), and there can be doubt that such surplus would have belonged to the complainant in this suit as the heir-at-law of the said John Shillaber, and not to Noble as administrator of his estate. The duties of this trust might as well have been imposed on the clerk of the Court, or any other suitable person, as on Noble. If Noble were made a party, and within the jurisdiction of the Court, he would be joined merely as a matter of form, for the sake of conformity in the bill, and this Court will not allow its jurisdiction to be ousted by reason of his non-joinder.

Wormley v. Wormley, 8 Wheaton, 421.

In this case, Mr. Justice Story speaks as follows:

"This Court will not suffer its jurisdiction
"to be ousted by the joinder or non-joinder of
"formal parties, but will rather proceed with-
"out them, and decide upon the merits of the
"case between the parties, who have the real
"interests before it, whenever it can be done
"without prejudice to the rights of others."

3d. Noble is not a necessary party to the accounting prayed for in this suit; the moneys of which we seek an account were received wholly by Robinson, and appropriated by him to his own use.

4th. Nor has Robinson any interest in having Noble made a party to this suit. He does not claim that he paid Noble any money as trustee under the Illinois decree, or upon the sale which was made by Noble to him, of the said New York lands, and if, as we claim, he connived with Noble with a fraudulent intent to defeat the provisions of said decree in favor of this complainant he is clearly within the rule, that where several trustees unite in a breach of trust, the *cestui que trust* may proceed against all or either of them.

Gilchrist v. Stevenson, 9 Barb. S. C. R., p. 9.

5th. The cases cited by the counsel for the appellee lend no support to the position for which he contends; on the contrary, they, with singular unanimity, sustain the claim of the appellant. The following brief analysis thereof will make this manifest:

In Williams v. Bankhead, 19 Wallace, 563, the party who was not joined, claimed an interest in a specific fund concerning the disposal of which the Court was called upon to adjudicate. The State Court of Desha county, Arkansas, had decreed that the sum of $\$3{,}666\frac{66}{100}$ be paid to one Mary Branch, and the Circuit Court in an action to which she was not a party, decreed that the same fund be paid to another party. Upon an appeal from the latter decree to this Court the objection that Mary Branch was not joined was considered, and it was here held that the objection was fatal. The rules concerning parties are laid down by Mr. J. Bradley on page 571. The case of Williams v. Bankhead most certainly comes under the first rule there enunciated. Our case just as certainly does not. Noble will be in no way effected by the decree, either *directly* or *indirectly*.

In Russell v. Clark's Exrs., 7 Cranch, 69, this Court held that assignees in bankruptcy were necessary parties to a bill against a bankrupt, and other parties to whom he had conveyed property in trust before bankruptcy. The reason of this is evident as the assignees had a direct, essential and beneficial interest involved. On page 98, Mr. Ch. Marshall concedes that a mere formal party such as Noble is here, is not indispensible. He can not be effected by any decree that can be made, and the real merits of the case may be determined without affecting his interests.

In Mallow v. Hinde, 12 Wheaton, 193, the determination of the questions before the Court involved the validity of certain executory agreements and the obligations arising therefrom, in which, parties not before the Court, were beneficially interested. It was held that no such determination would be made in the absence of those parties. The Court cite with approval the language of Mr. Ch. J. Marshall in the earlier case of Elmendorf v. Taylor, (10 W. 177): "If "the case may be completely decided as between "the litigant parties, the circumstance that an "interest exists in some other person, whom the "process of the Court cannot reach, as if such "party be the resident of some other State, "ought not to prevent a decree upon its merits."

In the Northern Indiana Railroad Co. v. Michigan Central R. R. Co., 15 How. 233, if the Court had granted the relief prayed for, it would have been necessary to determine the validity of the charter of the New Albany and Salem R. R. Co. which latter corporation was not before the Court. Under these circumstances, the interests of a person not a party to the action being vitally and essentially involved, no such determination could, of course, be had.

In conclusion it may be truly said, that all the authorities unite in declaring that the joinder of a formal party without any beneficial interest, *like Noble*, is not necessary to the determination of the litigation.

SEVENTH.

The decree of the Circuit Court should be reversed, and this Court should declare that the complainant is entitled to receive as follows:

(1.) The aggregate amounts for which the New York lands were sold by the defendant, $9,628 (Transcript, p. 14, f. 44), with interest on the same from the respective dates of sale to the date of its decree, less the amount *actually* due by complainant, to defendant at the date of the Illinois decree, $880.58, with interest to the same time, i. e., provided this Court is of the opinion that the error apparent on the face of the decree can be corrected.

(2.) If, however, the Court concludes that this manifest error cannot be corrected, the statement should be as follows: The aggregate amounts for which the New York lands were sold by the defendant, $9,628, with interest on the same from the respective dates of sale to the date of its decree, less the amount found due by complainant to defendant by the Illinois decree, $4,249.58 (Transcript, p. 31, f. 100), with interest to the date of the decree.

MICHAEL H. CARDOZO,
of Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

No. 25.

THEODORE SHILLABER,

Appellant,

vs.

JOHN ROBINSON,

Appellee.

BRIEF OF COUNSEL FOR APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

SUPREME COURT OF THE UNITED STATES,

ON APPEAL FROM

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF NEW YORK.

THEODORE SHILLABER,

Appellant,

against

JOHN ROBINSON,

Appellee.

BRIEF OF COUNSEL FOR APPELLEE.

Facts.

This is a bill filed on the equity side of the Court for a discovery and for other relief; and the bill alleges: That one John Shillaber, the father of the complainant, was, in his life-time, the owner of certain lands and premises, situated in the State of Illinois, and that he, John Shillaber, entered into an agreement to sell the same to the defendants upon the terms stated in the Bill, which agreement was made in October, 1852, that among other things, it was agreed that the property in Illinois should be conveyed to Robinson free of all encumbrances, and that the purchase price was $27,000, and Robinson was to pay for same by conveying to said John Shillaber certain premises in Flatbush, Kings Co., N. Y., and certain lands in Sullivan County, N. Y., and certain lands in Essex County, New York, at a valuation fixed in the agreement and stated in the bill, and was to pay $8,000 cash, and secure the balance by a second mortgage on a farm of said Robinson's in Flatbush, Kings County.

That afterwards the defendant Robinson filed a Bill in Equity in the Court of Chancery in the State of Illinois, against said John Shillaber for a specific performance of said agreement; that pending that suit John Shillaber died, and the action was revived against the complainant who, it is alleged, is the son and only heir at law of said John Shilla-

ber. And that one Silas Noble was appointed administrator of the estate of said John Shillaber, by the County Court of Ogle County; and that a supplemental bill was then filed in said suit against this Complainant, and said Silas Noble and other parties, and that such proceedings were thereupon had in said suit that at the October term, (what year?) of said Court of Chancery, *(allegation?* of the Ogle County Circuit Court of said State of Illinois,) an interlocutory decree was made whereby, It was ordered, adjudged and decreed among other things, (see Bill of Complaint from folio 8 of Appeal Book to folio 18, both inclusive, for provisions of Decree of Court of Chancery in Illinois,) and alleges that said decree was and is in full force. It then alleges an obvious error in the Decree, in the account stated of some four thousand dollars, which appears on the face of the Decree.

It alleges a complete and full compliance by Robinson with the terms of the Decree and a non-compliance by the complainant and Noble, and that at the expiration of the 90 days within which by the terms of the Decree, the complainant and Noble were to comply with it by payment to Robinson of the amount found due him, to wit: $4,240 58-100. The conveyances executed by Robinson to complainant of the New York property and delivered to Clerk of Court in Escrow were delivered up to Robinson by clerk pursuant
fol. 36. to said Decree and Robinson executed a trust deed to Noble as provided in said Decree.

It then alleges that complainant is *advised* that such trust deed is a mortgage, and could only be foreclosed by action or advertisement, and that complainant's equity of redemption could only be cut off in one of those two ways. (Does not allege that either complainant or his father ever had the equity of redemption, but the matters alleged show they never did.)

It alleges that when the final Decree was settled and entered in the Court of Chancery in Illinois, he was absent from State and was not represented by attorney or counsel, and that he was so embarrassed pecuniarily that he could not employ counsel, and, that he only discovered the alleged error in the account within a few days before the commencement of this suit.

It alleges on information and belief, that no such trust deed has ever been recorded in either of the Counties of Kings, Sullivan or Essex, and no proceedings taken to foreclose same.

It alleges on information and belief, that since the execution of the Trust Deed, Robinson has conveyed the property to other persons who are innocent purchasers for value, with-

out notice. That Robinson *pretends* to have become the purchaser of said lands at sales made by Noble, under and in pursuance of the Trust Deed, (folios 39–40.) And it expressly charges that if any such sale or sales were made by Noble to Robinson they were not made by Noble in pursuance of the Decree but in evasion thereof and in violation of the trust imposed upon said Noble and by a fraudulent connivance between Noble and Robinson.

It alleges a rise in the value of the property.

It alleges a request by complainant to Robinson to account and that Noble is a non-resident of the State of New York and cannot be found therein.

It alleges that complainant is a resident of California and Robinson of New York.

POINTS.

I.—Where the real merits of the cause cannot be determined without bringing before the Court as defendants parties who are not liable to be sued in the Circuit Court in conjunction with the other defendants, the suit cannot proceed unless they consent to make themselves parties.

Russell vs. Clarks, Ex'rs., per Marshall Ch. J.; 7th Cranch. Opinion at page 98.
Northern Ind. R. R. Co. vs. Michigan Central R. R. Co., 15 How., p. 245–246.
Mallow vs. Hinde, 12th Wheat., 193, op 196.
Act of Congress, 1839.
Brightley's Digest, p, 15 and 16—note B.
Williams vs. Bankhead, 19th Wall 563.
Carson vs. Robertson, 4th Circ. (S. C.) 1869. Chase, Dec. 475.

II.—The Circuit Court has no jurisdiction in any event of this case, except so far as it affects the lands in Flatbush, Kings County, the property in Sullivan and Essex Counties are not within the District.

Northern Ind. R. R. Co. vs. Michigan Cen. R. Co., 15th How. U. S. Rep., page 242 Opinion.

III.—The complaint does not state a cause of action. It shows that Robinson fully complied with the Decree of the Court of Chancery of Illinois, and that the complainant did not.

a. It shows that neither the complainant or his father ever had title to the Equity of Redemption of the lands in New York.

b. And whether Robinson sold any of the New York property or not after his conveyance in trust to Noble is of no interest to the complainant. Such sales amounted to nothing unless he had obtained a valid title by purchase from the trustee.

IV.—The alleged error in the account stated in the Decree of the Illinois Court cannot be reached or corrected in this action or by this Court.

a. Errors committed by the Court can only be examined by an appellate power.

Voorhees vs. Bank of U. S. 10th Peters 449.
Kinner vs. Kinner 45 N. Y. Rep, 535.

b. The Decree of the Court in Illinois cannot be affected or attacked in a collateral proceeding.

Cock vs. Halsey, 16th Peters 71.
Warburton vs. Aitken. 1st McLean 460
Halsey vs. Tyler, 2d Wall 328.
Nations vs. Johnson, 24 How. U. S. 195.
Jenkins vs. Eldridge, 1st Woodf. & M. 61.
Field vs. Gibbs, Pet. C. Ct. 155.

V.—The Trust Deed to Noble of the New York property was valid and created a valid trust under the statutes of New York.

2d Revised Statutes of New York, p. 355, sub. 2. [Vol. 1 Edmond's Ed. p. 677.]

And the fee of the land was vested in the Trustee subject to the execution of the Trust.

§ 60 of Statute, *supra*.
Noyes vs. Blakeman, 2d Selden [6 N. Y.] 578

VI.—The judgment should be affirmed.

PHILIP S. CROOKE,
Of Counsel for Defendant
JOHN ROBINSON.

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It alleges on information and belief, that no such trust deed has ever been recorded in either of the Counties of Kings, Sullivan or Essex, and no proceedings taken to foreclose same.

It alleges on information and belief, that since the execution of the Trust Deed, Robinson has conveyed the property to other persons who are innocent purchasers for value, without notice. That Robinson *pretends* to have become the purchaser of said lands at sales made by Noble, under and in pursuance of the Trust Deed,

(folios 39–40.) And it expressly charges that if any such sale or sales were made by Noble to Robinson they were not made by Noble in pursuance of the Decree but in evasion thereof and in violation of the trust imposed upon said Noble and by a fraudulent connivance between Noble and Robinson.

It alleges a rise in the value of the property.

It alleges a request by complainant to Robinson to account and that Noble is a non-resident of the State of New York and cannot be found therein.

It alleges that complainant is a resident of California and Robinson of New York.

POINTS.

I.—Where the real merits of the cause cannot be determined without bringing before the Court as defendants parties who are not liable to be sued in the Circuit Court in conjunction with the other defendants, the suit cannot proceed unless they consent to make themselves parties.

Russell vs. Clark's Ex'rs,. per Marshall Ch. J.: 7th Cranch. Opinion at page 98.
Northern Ind. R. R. Co. vs. Michigan Central R. R. Co., 15 How., p. 245-246.
Mallow vs. Hinde, 12th Wheat., 193, op 196.
Act of Congress, 1839.
Brightley's Digest, p. 15 and 16—note B.
Williams vs. Bankhead, 19th Wall 563.
Carson vs. Robertson, 4th Circ. (S. C.) 1869. Chase, Dec. 475.

When fraud and collusion is charged in the bill, the party charged with fraud is a necessary party, and is entitled to his day in court. Folio 157 of Record.

II.—The Circuit Court has no jurisdiction in any event of this case, except so far as it affects the lands in Flatbush, Kings County, the property in Sullivan and Essex Counties are not within the District.

Northern Ind. R. R. Co. vs. Michigan Cen. R. Co., 15th How. U. S. Rep., page 242 Opinion.

III.—The complaint does not state a cause of action. It shows that Robinson fully complied with the Decree of the Court of Chancery of Illinois, and that the complainant did not.

a. It shows that neither the complainant or his father ever had title to the Equity of Redemption of the lands in New York.

b. And whether Robinson sold any of the New York property or not after his conveyance in trust to Noble is of no interest to the complainant. Such sales amounted to nothing unless he obtained a valid title by purchase from the trustee.

IV.—The alleged error in the account stated in the Decree of the Illinois Court cannot be reached or corrected in this action or by this Court.

a. Errors committed by the Court can only be examined by an appellate power.

Voorhees vs. Bank of U. S., 10th Peters 449.
Kinner vs. Kinner, 45 N. Y. Rep, 535.

b. The Decree of the Court in Illinois cannot be affected or attacked in a collateral proceeding.

Cock vs. Halsey, 16th Peters 71.
Wrrburton vs. Aitken, 1st McLean 460.
Halsey vs. Tyler, 2d Wall 328.
Nations vs. Johnson, 24 How. U. S. 195.
Jenkins vs. Eldridge, 1st Woodf. & M. 61.
Field vs. Gibbs, Pet. C. Ct. 155.

V.—The Trust Deed of Noble of the New York property was valid and created a valid trust under the statutes of New York.

Corse vs. Leggett, 25 Barb. R., (New York,) page 389, op page 395.
Sedgwick vs. Stanton, 20 Barb., (New York,) page 478, op page 483.
2d Revised Statutes of New York, p. 355, sub. 1 & 2. [Vol. 1 Edmond's Ed. p. 677.]

Those subdivision are as follows:

1st. To sell lands for the benefit of creditors.

2d. To sell, mortgage, or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon.

a. Robinson was a creditor of Shillaber under the Decree of the Illinois Chancery Court.

See Transcript of Record, page 31, folio 101 et. seq.

b. The amount due him was made a charge and lien on the New York lands, by the Decree of Court of Chancery of Illinois.

See Transcript of Record, pages 31 to 34, and folio 110.

c. "When a sale is directed in the instrument creating the trust, such sale is valid."

Belmont vs. O'Brien, 12th New York R., page 405.

The property in New York was sold to *John A. Robinson* for the appellee and not to the *appellee.*

The appellee did not occupy any fiduciary relation either to Noble or Shillaber.—

Noble could not have purchased, he was a trustee — but Robinson was not, and even had he purchased the property he had a perfect right so to do.

None of the cases cited by the appellant have any bearing on this case, for the reason that they are all cases where a trustee has attempted to purchase for his own benefit trust property.

That is not this case.

If it is necessary to inquire whether this is a valid trust under the Law of Illinois, (which we submit it is not,) then we say it is such by the Statutes of that State.

See Statutes of Ill., Cross 3d Edition, 1869. Vol. 1, p. 84, § 3.

It is a well-settled principle that the law of the State where the land is situated governs in the construction of instruments affecting such land.

Abell vs. Douglass, 4 Denio, 305. The *lex loci contractus* governs as to the construction and effect of the contract.
Gans vs. Frank, 36 Barb. N. Y., 390.

a. The contract was made in New York.

Thompson vs. Ketcham, 8 Johnson, (N.Y.) R. p. 139,

It was to be executed in New York.

Transcript of Record, p. 35, folio 115; Story Conflict of Law, § 282; 6 Paige (N.Y.) 230; 2 Kent's Com., p. 457; Davis vs. Gar., 2 Seld. (N.Y.), p. 124; Jewell vs. Wright, 30 N. Y., 264.

b. If the Trust Deed could be held to be an Illinois Contract still as it was by its terms to be performed in New York, the law of New York must govern it.

Smith vs. Smith, 2d John (N. Y.) R., 235
Thompson vs. Ketcham, 4 John, 285.
Hyde vs. Goodnow, 3d (N. Y.) (3 Comstock), 266.
13 N. Y. 290, Bowen vs. Newell
10 N. Y. 436; 33 N. Y., 615.

And the fee of the land was vested in the Trustee subject to the execution of the Trust.

§ 60 Statute, *supra.*
Noyes vs. Blakeman. 2d Selden[6 N. Y.] 578.

VI. The judgment should be affirmed.

JOHN H. BERGEN,
PHILIP S. CROOKE,
Of Counsel for Defendant JOHN ROBINSON.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1877.

No. 25.

THEODORE SHILLABER,
Complainant and Appellant,

versus

JOHN ROBINSON.
Defendant and Appellee.

Statement and Brief in behalf of Appellant on motion for Rehearing.

MICHAEL H. CARDOZO,
Of Counsel for the Appellant.

MORRISON & NATHAN,
Printers and Blank Book Manufacturers,
23 Dey Street, N. Y.

IN THE

Supreme Court of the United States,

THEODORE SHILLABER, *Complainant and Appellant,* vs. JOHN ROBINSON, *Defendant and Appellee.*	*Statement and Brief in behalf of Appellant on Motion for Rehearing.*

This cause was submitted by both parties upon printed briefs on the 11th day of October, 1877.

The Court then consisted of eight justices, Mr. Justice Davis having resigned, and Mr. Justice Harlan not having received his commission.

FIRST.

The cause was tried before Mr. Justice Hunt, and the appeal was from a final decree of the Circuit Court of the United States for the Eastern District of New York, dismissing the complainant's bill of complaint with costs. (Transcript of Record, page 46.) The opinion of the learned justice is set out upon pages 44, 45 and 46 of the Transcript of Record.

This court has now decided the appeal, and, *being equally divided*, has affirmed the judgment.

The appellant moves for a reargument of the appeal before the full bench in accordance with the practice stated by Chief Justice Chase, in the case of Public Schools vs. Walker, (9 Wallace 603, 604). It is confidently submitted that the application should be granted.

The amount involved is large (see seventh point of Brief, page 36); and, if the decision of the Court below remains unreversed, it is obvious, that the appellant will be deprived of rights to which a majority of the learned justices of the Court might declare him justly entitled.

No better or stronger argument can be adduced to show that the questions involved are intricate and important than that the learned justices of this Court are equally divided in reference thereto.

Conflicting questions of fact are not at issue, only legal principles and their consequences, as embodied in judicial decisions that are applicable to the fairly conceded facts of the case.

A rehearing may shed additional light upon the points of difference, and the presence of a full bench will enable at least a majority thereof to unite in a prevailing opinion.

In order to expedite the business of the Court and not occupy the time consumed in an oral argument, counsel for the appellant will stipulate to again submit the appeal upon printed briefs, if the Court so desire.

Allowing a rehearing in this case will not, it is submitted, sanction any rule, which by operating as a precedent, may increase the heavy burden which now rests upon this Court, for it but rarely happens, that a case in the Court below is disposed of alone by a single judge of this Court, and the members thereof are subsequently equally divided on the questions which arise.

If counsel may be permitted to assume that the learned justice, who, *alone*, decided the cause in the Court below, was in favor of affirmance, then a majority of the judges, who have acted judicially upon the case (see opinion of Mr. Ch. J. Taney in Brown v. Aspden, 14 Howard, 25, 28,) have not concurred in the judgment pronounced, and by virtue of the right of a learned judge to sit in review of his own decision one member of this Court has, with all respect, disposed of the cause.

SECOND.

The questions of law involved herein are mainly three and the appellant confidently believes himself entitled to a distinct and favorable adjudication upon each and every one of them.

I. Must the appellee account to the appellant as mortgagee in possession of the New York lands?

In support of the appellant's claim, that Robinson does occupy the position of a mortgagee in possession of the lands in dispute, and in addition to the authorities cited and arguments set forth in his brief already filed, (Point I, page 9, et seq.,) the liberty is taken to refer to an able and exhaustive article appearing in a recent number of the Southern Law Review, (Vol. III, page 703, January, 1878,) over the signature of a distinguished writer on the law of mortgages. The nature of trust deeds, their relation to the law of mortgages, their resemblance to, and difference from mortgages are there enunciated with the most faithful adherence to reason and authority, and the greatest perspicuity. At page 712, the following language is used:

"A deed of trust to secure a debt, is in legal "effect, a mortgage. It is a conveyance made "to a person other than the creditor, condition- "ed to be void if the debt be paid at a certain "time, but, if not paid, that the grantee may sell "the land and apply the proceeds to the extin- "guishment of the debt, and pay over the sur- "plus to the grantor. The addition of the pow- "er of sale does not change the character of the "instrument any more than it does when con- "tained in a mortgage. Such a deed has all the "essential elements of a mortgage; it is a con- "veyance of land as security for a debt. It "passes the legal title to the grantee just as a "mortgage does, except in those States where "the natural effect of a conveyance is controlled "by statute; and in those States as a general "rule it is considered merely as a security, and "not a conveyance, just as a mortgage is con- "sidered. Both instruments convey a defeasi- "ble title only, and the right to redeem is the "same in one case as it is in the other. The "only important difference between them is that "in the one case the conveyance is directly to "the creditor, while in the other it is to a third "person for his benefit."

Citing:

Woodruff v. Robb, 19 Ohio, 212.
Sargent v. Howe, 21 Illinois, 148.
Newman v. Samuels, 17 Iowa, 528, 535.
Lawrence v. Farmers Loan & Trust Co., 13 N. Y. 200.
Palmer v. Gurnsey, 7 Wend. 248.
Eaton v. Whiting, 3 Pickering 484.
Corpman v. Baccastow Sup. Ct. of Penn. 1877, 5 N. Y. Weekly Digest 204.
Lenox v. Reed, 12 Kansas, 223, 227.
Turner v. Watkins, 31 Arkansas, 429, 437.

II. Could the appellee, occupying a fiduciary capacity, purchase the lands in question?

In addition to the authorities cited upon appellants brief (Point third, page 27) to maintain the position that the appellee could not become the purchaser of property in respect to which he stood in a position of trust, reference is also made to the following:

Van Epps v. Van Epps, 9 Paige's Ch. 237.
Conger v. Ring, 11 Barb. (Sup. Ct. Rep.) 356, 363.
Case v. Carroll, 35 N. Y. 385, 388.
Colburn v. Morton, 3 Keyes, 296, 305.
Fulton v. Whitney, 66 N. Y. 548, 555–7.
Gardner v. Ogden, 22 Id. 327, 343.

III. Is Noble a necessary party?

That he is not is clearly shown in the Sixth Point of the appellant's brief, (page 34, et seq.), and but little can be added thereto.

The cases cited by the counsel for the appellee lend no support to the position for which he contends; on the contrary, they, with singular unanimity, sustain the claim of the appellant. The following brief analysis thereof will make this manifest:

In Williams v. Bankhead 19 Wallace 563, the party who was not joined, claimed an interest in a specific fund concerning the disposal of which the Court was called upon to adjudicate. The State Court of Desha County, Arkansas, had decreed that the sum of $3,666\frac{88}{100}$ be paid to one Mary Branch, and the Circuit Court in an action to which she was not a party decreed that the same fund be paid to another party. Upon an appeal

from the latter decree to this Court the objection that Mary Branch was not joined was considered, and it was here held that the objection was fatal. The rules concerning parties are laid down by Mr. J. Bradley on page 571. The case of Williams v. Bankhead most certainly comes under the first rule there enunciated. Our case just as certainly does not. Noble will be in no way affected by the decree, either *directly* or *indirectly*.

In Russell v. Clark's Exrs., 7 Cranch, 69, this Court held that assignees in bankruptcy were necessary parties to a bill against a bankrupt, and other parties to whom he had conveyed property in trust before bankruptcy. The reason of this is evident as the assignees had a direct, essential and beneficial interest involved. On page 98, Mr. Ch. J. Marshall concedes that a mere formal party such as Noble is here, is not indispensible. He can not be affected by any decree that can be made, and the real merits of the case may be determined without affecting his interests.

In Mallow v. Hinde, 12 Wheaton, 193, the determination of the questions before the Court involved the validity of certain executory agreements and the obligations arising therefrom in which, parties not before the Court, were beneficially interested. It was held that no such determination would be made in the absence of those parties. The Court cite with approval the language of Mr. Ch. J. Marshall in the earlier case of Elmendorf v. Taylor, (10 W. 177): "If the case may be completely "decided as between the litigant parties, the cir- "cumstance that an interest exists in some other "person, whom the process of the Court cannot "reach, as if such party be the resident of some "other State, ought not to prevent a decree upon "its merits."

In The Northern Indiana Railroad Co. v. Michigan Central R. R. Co., 15 How. 233, if the Court had granted the relief prayed for, it would have been necessary to determine the validity of the charter of the New Albany and Salem R. R. Co. which latter corporation was not before the Court. Under these circumstances, the interests of a person not a party being vitally and essentially involved, no such determination could, of course, be had.

In conclusion it may be truly said, that all the authorities unite in declaring that the joinder of a formal party without any beneficial interest, *like Noble*, is not necessary to the determination of the litigation.

MICHAEL H. CARDOZO,
Of Counsel for Appellant.